S. Hrg. 100-801

THE BERNE CONVENTION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 1301 and S. 1971

BILLS TO AMEND TITLE 17, UNITED STATES CODE, TO IMPLEMENT THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, AS REVISED AT PARIS ON JULY 24, 1971, AND FOR OTHER PURPOSES

FEBRUARY 18 AND MARCH 3, 1988

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THE BERNE CONVENTION

THURSDAY, FEBRUARY 18, 1988

U.S. SENATE,
SUBCOMMITTEE ON PATENTS,
COPYRIGHTS AND TRADEMARKS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:38 a.m., in room 226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Senators Hatch, Leahy, and Grassley.

Staff present: Edward H. Baxter, chief counsel and staff director; Cecilia Swensen, legislative aide/chief clerk; Elizabeth McFall, staff assistant; Kelly Barr, legal intern; Jon James, legal intern; Randy Rader, minority chief counsel (Subcommittee on Patents, Copyrights and Trademarks); Abby Kuzma, general counsel for Senator Hatch; Steve Metalitz, special counsel for Senator Leahy; Matt Gerson, general counsel for Senator Leahy; Mamie Miller, counsel for Senator Heflin; and Melissa Patack, minority counsel for Senator Grassley.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. The Subcommittee on Patents, Copyrights and Trademarks will come to order.

I'm pleased to convene today hearings of the Subcommittee on Patents, Copyrights and Trademarks to receive testimony from a very distinguished group of witnesses. The subject that we will be discussing is certainly not a new one. The question of whether the United States should join the Berne Convention for the protection of literary and artistic works has confronted us for over 100 years. This year I hope we can finally answer that question in the affirmative.

For most of the 100 years since the Berne Convention was first ratified, the United States was concerned only with domestic copyright protection. Our domestic copyright laws were not compatible with Berne in a number of ways. If we were concerned at all about protecting our copyrights international infringement, we were content to attempt to do it through bilateral agreements.

There were periodic efforts in Congress to adhere to Berne. In fact, in 1935, the Senate actually ratified the Berne Convention only to rescind this ratification 3 days later. There are a number of reasons why efforts to adhere to Berne have always failed. Chief among them has been the feeling that we didn't need Berne and that there were provisions required by it that were dangerous to some American copyright interests. These factors combined to frustrate all ratification efforts until now.

The market for U.S.-copyrighted materials continued to grow and the need for protection increased. As an alternative to Berne, the United States led a successful effort to create a separate international copyright treaty under the auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO). This treaty, the Universal Copyright Convention, or UCC, was ratified in 1954. The UCC has not proved to be adequate to protect the efforts of our creative artists in today's world.

Trade among the nations of the world has increased so fast that we've been unable to update our laws governing international trade at the same pace. I believe that the various laws governing intellectual property protection are among our most outdated. Particularly in the area of copyright, we can no longer afford to go it alone.

In 1976, due in large part to the efforts of our first witness today, Congressman Bob Kastenmeier, a major reform of our domestic copyright laws was enacted. The 1976 act was the first major reform of these laws since 1909, and it went a long way to conform our laws with the provisions of Berne.

Last year, one other impediment to our joining Berne, the manufacturing clause, expired and was not reauthorized. These changes spurred renewed efforts in the U.S. copyright and business community to gain the international protection of Berne.

There are a few remaining questions about differences between our domestic copyright laws and the provisions of Berne. During the last Congress these questions prevented our ratification of Berne. However, due in large part to the leadership of our last witness today, Irwin Karp, the argument that our domestic copyright laws are an absolute bar to ratification of Berne has been at least strongly questioned. He will testify about the report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention which he chaired. That group, formed at the request of the State Department, concluded that no change in U.S. copyright law is absolutely required as a prerequisite to Berne membership.

During the 99th Congress, this subcommittee heard from Dr. Arpa Bogsch, the Director General of the World Intellectual Property Organization (WIPO). WIPO administers the Berne Convention. Dr. Bogsch testified that little, if any, change needs to be made in our laws to allow us to ratify Berne. We hope to hear the opinions of our witnesses on this question here today.

The Congress already has a very good hearing record on the issue of Berne adherence. Senator Mathias held extensive and thorough hearings on the subject during his chairmanship of this subcommittee. Congressman Kastenmeier has prepared an excellent record for our consideration in this Congress.

Our subcommittee hopes to build on the existing record with two informative hearings, today and on March 3. We hope then to join with Chairman Kastenmeier in moving on this legislation early in the session.

[Copies of S. 1301 and S. 1971 follow:]

II

100TH CONGRESS
1ST SESSION

S. 1301

To amend title 17, United States Code, to implement the Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris on July 24, 1971, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 29, 1987

Mr. LEAHY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, to implement the Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris on July 24, 1971, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Berne Convention Implementation Act of 1987".

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) United States adherence to the International Convention for the Protection of Literary and Artistic Works (known, and hereinafter referred to in this Act, as the "Berne Convention") would—

(A) enhance copyright protection for the works of American authors, artists, and other creators;

(B) strengthen relations with other nations in the copyright field; and

(C) serve the national interest;

(2) the Berne Convention is not self-executing under the Constitution and laws of the United States;

(3) the obligations of the United States as a Berne Union member may be performed only pursuant to appropriate domestic law; and

(4) the amendments made by this Act, together with existing law, will enable the United States to meet its obligations as a nation adhering to the Berne Convention, and no further legislation will be necessary for that purpose.

(b) CONSTRUCTION.—The Berne Convention shall—

(1) be given effect under title 17, United States Code, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and

(2) not be enforceable in any action brought pursuant to the provisions of such Convention itself.

SEC. 3. SUBJECT MATTER AND SCOPE OF COPYRIGHTS.

(a) IN GENERAL.—Chapter 1 of title 17 of the United States Code is amended—

(1) in section 101—

(A) by inserting between the definition of "anonymous work" and the definition of "audiovisual works", the following new definition:

" 'Architectural works' are buildings and other 3-dimensional structures of an original artistic character, and works relative to architecture, such as building plans, blueprints, designs, and models.";

(B) by inserting between the definition of "audiovisual works" and the definition of "best edition", the following:

"The 'Berne Convention' is the Convention for the protection of Literary and Artistic Works signed at Berne, Switzerland, on September 9, 1886, together with its later additional acts, protocols, and revisions, up to and including the Paris revision of 1971.

"A work is a 'Berne Convention work' if—

"(1) in the case of an unpublished work, one or more of the authors is a national of a Berne Union member, or in the case of a published work, one or more of the authors is a national of a Berne Union member on the date of first publication, and for purposes of this paragraph, authors who are domiciled or have their habitual residence in a Berne Union member are considered nationals of that member;

"(2) the work was first published in a Berne Union member, or was simultaneously published in a Berne Union member and in a foreign nation that is not a Berne Union Member, and for the purposes of this paragraph, a work is considered as having been published simultaneously in two or more nations if it has been published in one nation within thirty days of its publication in the other nation;

"(3) in the case of an audiovisual work—

"(A) one or more of the authors is a legal entity, and that author has its headquarters in a Berne Union member; or

"(B) one or more of the authors is an individual, and that author has his or her habitual residence or domicile in a Berne Union member;

"(4) in the case of a pictorial, graphic, or sculptural work, such work is incorporated in a building or other structure located in the territory of a Berne Union member; or.

"(5) in the case of an architectural work in the form of a building or other 3-dimensional structure, the work is erected in the territory of a Berne Union member.

"A 'Berne Union member' is a country or nation that is bound by any one of the texts of the Berne Convention."; and

(C) in the definition of "pictorial, graphic, and sculptural works", by inserting before the period at the end of the first sentence the following: ", other than architectural works";

(2) in section 102(a)—

(A) by striking out "and" at the end of paragraph (6);

(B) by striking out the period at the end of paragraph (7) and inserting in lieu thereof "; and"; and

(C) by adding at the end thereof the following new paragraph:

"(8) architectural works.";

(3) in section 104(b)—

(A) by redesignating paragraph (4) as paragraph (5); and

(B) by inserting after paragraph (3) the following new paragraph (4):

"(4) the work is a Berne Convention work; or";

(4) in section 108(a)—

(A) by inserting after the semicolon at the end of paragraph (1), "and";

(B) by striking out "; and" at the end of paragraph (2) and inserting in lieu thereof a period; and

(C) by repealing paragraph (3);

(5) by striking out section 116 and inserting in lieu thereof the following:

"§ 116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players

"(a) This section applies to any nondramatic musical work embodied in a phonorecord.

"(b)(1) In the case of a work to which this section applies, the exclusive right under paragraph (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited to the extent that paragraph (2) applies.

"(2) If, within 1 year after the effective date of the Berne Convention Implementation Act of 1987, the Copyright Royalty Tribunal, (as established by section 801, and hereinafter referred to as the 'Tribunal') certifies by publication in the Federal Register that negotiated licenses authorized by subsection (c) have not come into effect to provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period prior to the effective date of that Act, then section 116 of this title as in effect on the day before the effective date of that Act shall be effective with respect to musical works that are not the subject of such negotiated licenses.

"(c)(1) Notwithstanding any other provision of law, any owner of a copyright in a work to which this section applies and any operator of a coin-operated phonorecord player may—

"(A) negotiate and agree on the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among various copyright owners; and

"(B) designate common agents to negotiate, agree to, pay, or receive such royalty payments.

"(2)(A) A party to a negotiation referred to in paragraph (1), within the time as may be specified by a regulation of the Tribunal, may determine the result of the negotiation by arbitration.

"(B) The arbitration referred to in subparagraph (A) shall be governed by the provisions of title 9, to the extent that such title is not inconsistent with this section.

"(C) The parties to the negotiations shall give the Tribunal notice of any determination reached by arbitration.

"(D) Any determination made through arbitration shall, as between the parties to the arbitration, be dispositive of the issues to which it relates.

"(d) License agreements between one or more copyright owner and one or more operator of coin-operated phonorecord players, which are negotiated in accordance with subsection (c), shall be given effect in lieu of any otherwise applicable determination by the Tribunal.

"(e) If, within 60 days after the effective date of the Berne Convention Implementation Act of 1987, the Chairman of the Tribunal has not received notice of the date and location of the first meeting between copyright owners and owners of coin-operated phonorecord players, referred to in subsection (c)(1), from such owners or operators, the Chairman shall determine and announce the date and location of such meeting, but in no event shall such meeting be held more than 90 days after the effective date of that Act.

"(f) The Tribunal shall not conduct any ratemaking activity with respect to coin-operated phonorecord players unless, at any time beginning 1-year after the effective date of the Berne Convention Implementation Act of 1987, the negotiated licenses adopted by the parties under this section do not provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending on the effective date of such Act.

"(g)(1) Until such time as licensing provisions are determined by the parties under this section, the terms of the compulsory license, with respect to the public performance of nondramatic musical works by means of coin-operated phonorecord players, that is in effect on the day before the effective date of the Berne Convention Implementation Act of 1987, shall remain in force.

"(2) If the negotiated licenses authorized by this section come into force so as to supersede previous determinations of the Tribunal as provided in subsection (d), but thereafter are terminated or expire without replacement by subsequent agreements, then section 116 of this title, as in effect on the day before the effective date of the Berne Convention Implementation Act of 1987, shall be effective with respect to musical works that are not the subject of such negotiated licenses.

"(h) As used in this section, the following terms and their variant forms means the following:

"(1) A 'coin-operated phonorecord player' is a machine or device that—

"(A) is employed solely for the performance of non-dramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

"(B) is located in an establishment making no direct or indirect charge for admission;

"(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

"(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

"(2) An 'operator' is any person who, alone or jointly with others—

"(A) owns a coin-operated phonorecord player; or

"(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

"(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player."; and

(6) by adding at the end thereof the following new section:

"§ 119. Scope of exclusive rights in architectural works

"(a) The exclusive rights of a copyright owner in an architectural work shall apply only to the artistic character and artistic design of the work, and shall not extend to processes or methods of construction.

"(b) The copyright in an architectural work does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, when the work is erected in a location accessible to the public.

"(c) The owner of a copyright in an architectural work—

"(1) shall not be entitled to obtain an injunction under section 502 of this title to restrain the construction or use of an infringing building, if construction has substantially begun; and

"(2) may not obtain a court order, under chapter 5 of this title, requiring that an infringing building be demolished or seized.

"(d) It is not an infringement of copyright in an architectural work for the owner of a building embodying such architectural work, without the consent of the author or copyright owner, to make or authorize the making of alterations to such building, in order to enhance the utility of the building.".

(b) Conforming Amendment.—The table of sections at the beginning of such chapter is amended by adding at the end thereof the following:

"119. Scope of exclusive rights in architectural works.".

SEC. 4. RECORDATION.

Section 205 of title 17, United States Code, is amended—

(1) by striking out subsection (d); and

(2) by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

SEC. 5. NOTICE OF COPYRIGHT.

(a) VISUALLY PERCEPTIBLE COPIES.—Section 401 of title 17, United States Code, is amended—

(1) by striking out "shall" in subsection (a), and inserting in lieu thereof "may";

(2) by striking out "The notice appearing on the copies shall" in subsection (b), and inserting in lieu thereof "If a notice appears on the copies, it may";

(3) by striking out "The notice" in subsection (c), and inserting in lieu thereof "Any notice referred to in subsection (a)"; and

(4) by adding at the end thereof the following new subsection:

"(d) EVIDENTIARY WEIGHT OF NOTICE.—No weight shall be given to the interposition of a defense based on 'innocent infringement' in mitigation of actual or statutory damages, or of other relief authorized by this title, if notice of copyright, in the form specified by this section, appears on the published copy or copies to which a defendant in the copyright infringement suit has access.".

(b) PHONORECORDS OF SOUND RECORDINGS.—Section 402 of title 17, United States Code, is amended—

(1) by striking out "shall" in subsection (a), and inserting in lieu thereof "may";

(2) by striking out "The notice appearing on the phonorecords shall" in subsection (b), and inserting in lieu thereof "If a notice appears on the phonorecords, it may";

(3) by striking out "The notice" in subsection (c), and inserting in lieu thereof "Any notice referred to in subsection (a)"; and

(4) by adding at the end thereof the following new subsection:

"(d) EVIDENTIARY WEIGHT OF NOTICE.—No weight shall be given to the interposition of a defense based on 'innocent infringement' in mitigation of actual or statutory damages, or of other relief authorized by this title, if notice of copyright, in the form specified by this section, appears on the published phonorecord or phonorecords to which a defendant in the copyright infringement suit has access.".

(c) PUBLICATIONS INCORPORATING UNITED STATES GOVERNMENT WORKS.—Section 403 of title 17, United States Code, is amended by striking out "the notice of copyright" and all that follows through "title." and inserting in lieu thereof "such copies or phonorecords shall prominently display a statement identifying those portions of the copies or phonorecords that constitute a work of the United States Government, in accordance with regulations issued by the Copyright Office.".

(d) CONTRIBUTIONS TO COLLECTIVE WORKS.—Section 404 of title 17, United States Code, and the heading for such section are repealed.

(e) OMISSION OF NOTICE.—

(1) EFFECT OF OMISSION.—Section 405 of title 17, United States Code, is amended—

(A) in subsection (a), by striking out "The omission of the copyright notice prescribed by" and inserting in lieu thereof "With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1987, the omission of the copyright notice described in"; and

(B) in subsection (b), by striking out "omitted," in the first sentence and inserting in lieu thereof "omitted before the effective date of the Berne Convention Implementation Act of 1987,".

(2) SECTION HEADING AND TABLE OF SECTIONS.—

(A) SECTION HEADING.—The heading of section 405 is amended to read as follows:

"§ 405. Notice of copyright: Omission of notice on certain copies and phonorecords"

(B) TABLE OF SECTIONS.—The table of sections at the beginning of chapter 4 of such title is amended by striking out the item relating to sections 404 and 405 and inserting in lieu thereof the following:

"404. Repealed.
"405. Notice of copyright: Omission of notice on certain copies and phonorecords.".

(f) ERROR IN NAME OR DATE.—

(1) NOTICE OF COPYRIGHT: ERROR.—Section 406 of title 17, United States Code, is amended—

(A) in subsection (a), by striking out "Where" in the first sentence and inserting in lieu thereof "With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1987, where";

(B) in subsection (b) by inserting "before the effective date of the Berne Convention Implementation Act of 1987," after "distributed" in the first sentence; and

(C) in subsection (c) by striking out all that follows the subsection designation, and inserting in lieu thereof "Where copies or phonorecords publicly distributed before the effective date of the Berne Convention Implementation Act of 1987, by authority of the copyright owner, contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 405 as in effect on the day before the effective date of the Berne Convention Implementation Act of 1987.".

(2) SECTION HEADING AND TABLE OF SECTIONS.—

(A) SECTION HEADING.—The heading of section 406 is amended to read as follows:

"§ 406. Notice of copyright: Error in name or date on certain copies and phonorecords"

(B) TABLE OF SECTIONS.—The table of sections at the beginning of chapter 4 of such title is amended by striking out the item relating to section 406 and inserting in lieu thereof the following:

"406. Notice of copyright: Error in name or date on certain copies and phonorecords.".

SEC. 6. DEPOSIT OF COPIES OR PHONORECORDS FOR LIBRARY OF CONGRESS.

Section 407 of title 17, United States Code is amended—

(1) in subsection (a), by striking out "with notice of copyright";

(2) in subsection (d)(1), by striking out "$250" and inserting in lieu thereof "$500"; and

(3) in subsection (d)(3), by striking out "$2,500," and inserting in lieu thereof "$5,000,";

SEC. 7. COPYRIGHT REGISTRATION.

(a) REGISTRATION IN GENERAL.—Section 408 of title 17, United States Code, is amended—

(1) in subsection (a), by striking out "Subject to the provisions of section 405(a), such" in the second sentence and inserting in lieu thereof "Such";

(2) in subsection (c)(2)—

(A) by striking out "all of" in the matter before subparagraph (A);

(B) by striking out subparagraph (A); and

(C) by redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively.

(b) APPLICATION FOR REGISTRATION.—Section 409 is amended—

(1) by inserting "and" at the end of paragraph (9);

(2) by striking out paragraph (10); and

(3) by redesignating paragraph (11) as clause (10).

(c) INFRINGEMENT ACTIONS.—

(1) REGISTRATION AS A PREREQUISITE.—Section 411 of title 17, United States Code, is amended to read as follows:

"§ 411. Registration and infringement actions

"(a) Registration is not a prerequisite to the institution of a civil action for infringement of copyright.

"(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, before such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner serves notice upon the infringer, not less than 10 or more than 30 days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to enforce copyright protection in the work.".

(2) TABLE OF SECTIONS.—The table of sections at the beginning of chapter 4 of such title is amended by striking out the item relating to section 411 and inserting in lieu thereof the following:

"411. Registration and infringement actions.".

(d) REMEDIES FOR INFRINGEMENT.—Section 412 of title 17, United States Code, is amended—

(1) by striking out the period at the end of clause (2), and inserting in lieu thereof "; or"; and

(2) by adding at the end thereof the following new clauses:

"(3) any other infringement of copyright in a work published after the effective date of the Berne Convention Implementation Act of 1987, unless the work is registered within 5 years after publication; or

"(4) any infringement of copyright, in a case in which the person otherwise entitled to such an award claims, by virtue of a transfer of copyright ownership, made after the effective date of the Berne Convention Implementation Act of 1987, to be the owner of the copyright or of any exclusive right under a copyright, unless the instrument of transfer under which such person claims has been recorded in the Copyright Office pursuant to section 205 within 5 years after such transfer, but such an award may be made after such recordation with respect to a cause of action that arose before recordation.".

SEC. 8. COPYRIGHT INFRINGEMENT AND REMEDIES.

(a) INFRINGEMENT.—Section 501(b) of title 17, United States Code, is amended by striking out "sections 205(d) and 411," and inserting in lieu thereof "section 411(b),".

(b) DAMAGES AND PROFITS.—Section 504(c) of title 17, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking out "$250", and inserting in lieu thereof "$500"; and

(B) by striking out "$10,000", and inserting in lieu thereof "$20,000";

(2) in paragraph (2)—

(A) by striking out "$50,000.", and inserting in lieu thereof "$100,000."; and

(B) by striking out "$100.", and inserting in lieu thereof "$200.".

(c) LIMITATIONS ON ACTIONS.—

(1) CRIMINAL PROCEEDINGS.—Section 507(a) of title 17, United States Code, is amended by adding before the period at the end thereof the following: ", and no criminal proceeding shall be instituted under the provisions of this title with respect to a work until registration of the copyright claim in such work has been made in accordance with this title.".

(2) SECTION HEADING AND TABLE OF SECTIONS.—

(A) SECTION HEADING.—The heading of section 507 is amended to read as follows:

"§ 507. Limitations on, and prerequisites to, actions"

(B) TABLE OF SECTIONS.—The table of sections at the beginning of chapter 5 of such title is amended by striking out the item relating to section 507 and inserting in lieu thereof the following:

"507. Limitations on, and prerequisites to, actions".

SEC. 9. AUTHORIZATION FOR THE COPYRIGHT ROYALTY TRIBUNAL TO SET JUKEBOX INTERIM RATES.

At the end of section 804(a) of title 17, United States Code, strike the period and insert in lieu thereof: ", and at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire without replacement by subsequent agreements; and

"(3) if negotiated licenses authorized by section 116 come into force so as to supersede previous determinations of the Tribunal, as provided in section 116(d), but thereafter are terminated or expire without replacement by subsequent agreements, the Tribunal shall, upon petition of any party to such terminated or expired negotiated license agreement, promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such interim royalty rate or rates shall remain in force until the conclusion of proceedings to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(d). The Tribunal may order that the royalty rates finally determined by the Tribunal to be reasonable shall be retroactive to the date such previously negotiated license agreements were terminated or expired.".

SEC. 10. WORKS IN THE PUBLIC DOMAIN.

Title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States.

SEC. 11. EFFECTIVE DATE; EFFECT ON PENDING CASES AND CURRENT LAW.

(a) EFFECTIVE DATE.—This Act and the amendments made by this Act shall take effect on the day after the date on which the Berne Convention (as defined in section 101 of title 17, United States Code, as amended by this Act) enters into force with respect to the United States.

(b) EFFECT ON PENDING CASES.—Any cause of action arising under title 17, United States Code, before the effective date of this Act shall be governed by the provisions of such title as in effect when the cause of action arose.

(c) EFFECT ON CURRENT LAW.—

(1) TITLE 17 PROTECTION.—Any right or interest in a work eligible for protection under title 17, United States Code, may not be claimed directly under the provisions of the Berne Convention.

(2) OTHER FEDERAL OR STATE PROTECTION.—Any right or interest in works protected under title 17, United States Code, that derives from other Federal or State laws, or the common law, shall not be reduced or expanded by virtue of the provisions of the Berne Convention or this Act.

SEC. 12. AUTHORIZATION OF APPROPRIATIONS.

There are hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act.

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100TH CONGRESS
1ST SESSION

S. 1971

To amend title 17 of the United States Code to implement the Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris on July 24, 1971, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 18 (legislative day, DECEMBER 15), 1987

Mr. HATCH (by request) (for himself and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 17 of the United States Code to implement the Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris on July 24, 1971, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Berne Convention Implementation Act of 1987".

SEC. 2. (a) The Congress finds and declares that—

(1) the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) is

(j. 19-108)

not self-executing under the Constitution and laws of the United States;

(2) the obligations of the United States under the Berne Convention may be satisfied only by appropriate domestic law;

(3) title 17 of the United States Code does not provide copyright protection for any work that is in the public domain in the United States; and

(4) title 17 of the United States Code does not provide an author with the right to be named as a work's author or to object to uses or changes to the work that would prejudice the author's reputation or honor.

(b) It is the intent of the Congress that—

(1) any obligation of the United States to provide the author with the right to be named as a work's author or to object to uses or changes to the work as a consequence of adherence to the Berne Convention be satisfied by United States law as it exists on the effective date of this Act whether such rights are recognized under any relevant provision of Federal or State statutes or the common law and such rights shall neither be enlarged nor diminished by this Act;

(2) the United States, by the amendments made by this Act together with existing law, meets its obli-

gations as a nation adhering to the Berne Convention and that no further legislation is necessary for that purpose; and

(3) the provisions of the Berne Convention shall be given effect solely under title 17 of the United States Code, as amended by this Act, and any other relevant provision of Federal or State law, including common law, and shall not be directly enforceable in any action brought on the provisions of the Berne Convention itself.

SEC. 3. The instrument of accession by the United States to the Berne Convention shall specify that the Convention will enter into force for the United States three months after the Director General of the World Intellectual Property Organization has notified other member countries of the deposit of the instrument of accession.

SEC. 4. Chapter 1 of title 17 of the United States Code is amended—

(a) in section 101, by—

(1) inserting between the definition of "anonymous work" and "audio visual works" the following:

"An 'architectural work' is a work such as a building or other three-dimensional structure and related works such as plans, blueprints, sketches, drawings, diagrams and models relating to such building or structure.".

(2) inserting between the definition of "audiovisual works" and "best edition", the following definitions:

"The 'Berne Convention' is the Convention for the Protection of Literary and Artistic Works signed at Berne on September 9, 1886, together with its later additional acts, protocols, and revisions.

"A work is a 'Berne Convention work' if—

"(1) in the case of an unpublished work, one or more of the authors is a national of a nation that is a party to the Berne Convention, or in the case of a published work, one or more of the authors is a national of a nation that is a party to the Berne Convention on the date of first publication, and for these purposes authors who are domiciled or have their habitual residence in a nation that is a party to the Berne Convention are considered nationals of that nation;

"(2) the work is first published in a nation that is a party to the Berne Convention, or was simultaneously published in a nation that is a party to the Berne Convention and for these purposes a work is simultaneously published if it is published in a nation that is a party to the Berne

Convention within thirty days of its publication in its place of first publication;

"(3) in the case of an audiovisual work: (A) if one or more of the authors is a legal entity, said author has its headquarters in a nation that is a party to the Berne Convention; or (B) if one or more of the authors is an individual, said author has a habitual residence or domicile in a nation that is a party to the Berne Convention;

"(4) in the case of an architectural work, the work was erected in a nation that is a party to the Berne Convention; and

"(5) in the case of a pictorial, graphic, or sculptural work, the work is incorporated in a building or other structure located in a nation that is a party to the Berne Convention.".

(b) in section 102(a) by—

(1) striking out "and" at the end of clause (6);

(2) striking out the period at the end of clause (7) and inserting "; and"; and

(3) adding a new clause (8) as follows:

"(8) architectural works.";

(c) in section 104, by—

(1) renumbering paragraph (4) of subsection (b) as paragraph (5); and

(2) adding between paragraph (3) and paragraph (5), as redesignated herein, a new clause as follows:

"(4) the work is a Berne Convention work; or"

(3) by adding new paragraph (6), as follows:

"(6) no right or interest in a work protectible under this title may be claimed under the provisions of the Berne Convention. Rights in works protected under this title that derive from other Federal or State statutes, or the common law, shall be neither expanded nor reduced by virtue of the provisions of the Berne Convention.".

(d) in section 116 by replacing the present language in its entirety by the following:

"(a) LIMITATION ON EXCLUSIVE RIGHT.—In the case of a nondramatic musical work embodied in a phonorecord, the exclusive right under clause 4 of section 106 to perform the work publicly by means of a coin-operated phonorecord player shall be limited if, one year after the effective date of this Act, the Copyright Royalty Tribunal certifies by publication in the Federal Register that the negotiated licenses authorized by paragraph (b) have not been ratified or come into force so as to provide copyright clearances for a quantity of musical works not substantially smaller than the quantity performed on coin-operated phonorecord players during the year prior to the effective date of this Act. If such certification is made, then section 116 as it existed immediately before the effective date of this Act, shall be effective with respect to musical works that are not the subject of negotiated licenses.

"(b) AUTHORITY FOR NEGOTIATIONS.—

"(1) Notwithstanding any provision of the antitrust laws, any owners of copyright in works specified by this subsection and any operators of coin-operated phonorecord players, respectively, may negotiate and agree upon the terms and rates of royalty payments and the proportionate division of such royalties paid among various copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such payments.

"(2) Parties to such a negotiation, within such time as may be specified by the Copyright Royalty Tribunal by regulation, may determine the result of the negotiation by arbitration. Such arbitration shall be governed by the provisions of title 9, to the extent such title is not inconsistent with this section. The parties shall give notice of any determination reached by arbitration to the Copyright Royalty Tribunal and any such determination shall, as between the parties to the arbitration, be dispositive of the issues to which it relates.

"(c) LICENSE AGREEMENTS SUPERIOR TO COPYRIGHT ROYALTY TRIBUNAL DETERMINATIONS.—License agreements between one or more copyright owners and one or more operators of coin-operated phonorecord players, negotiated in accordance with paragraph (b), shall be given effect in lieu of any determination by the Copyright Royalty Tribunal.

"(d) NEGOTIATION SCHEDULE.—Not later than sixty days after the effective date of this Act, the Chairman of the Copyright Royalty Tribunal shall either receive notice of the date and location of the first meeting between copyright owners and operators of coin-operated phonorecord players to commence negotiations authorized by paragraph (b) or if the Chairman is not notified of such a date, the Chairman shall set the date and location of such meeting. These dates shall be announced by publication in the Federal Register. In neither event shall such meeting be scheduled for a date later than ninety days after the effective date of this Act.

"(e) Copyright Royalty Tribunal to Suspend Various Activities.—The Copyright Royalty Tribunal shall conduct no ratemaking activity with respect to coin-operated phonorecord players unless, at any time more than one year after the effective date of this Act, the negotiated licenses adopted by the parties do not provide copyright clearances for a quantity of musical works not substantially smaller than the quantity performed on coin-operated phonorecord players during the year prior to the effective date of this Act.

"(f) TRANSITIONAL PROVISIONS; RETENTION OF COPYRIGHT ROYALTY TRIBUNAL JURISDICTION.—Until such time as licensing provisions are determined by the parties, the terms of the compulsory license in effect immediately before the effective date of this Act shall remain in force. If the negotiated licenses authorized by this Act come into force so as to supercede previous determinations of the Copyright Royalty Tribunal, as provided in paragraph (c), but thereafter are terminated or expire without replacement by subsequent agreements, then section 116 as it existed immediately before the effective date of this Act shall be effective with respect to musical works that are not the subject of negotiated licenses.".

(e) by adding a new section 119 as follows:

"§ 119 Scope of exclusive rights in architectural works

"(a) The exclusive rights of the owner of copyright in an architectural work are limited to the rights specified in clauses (1), (2), (3) and (5) of section 106 and in accordance with section 102(b) do not extend to any process, method of construction or purely utilitarian features of such works.

"(b) The copyright in an architectural work is not infringed by the making of a painting, drawing, photograph or other pictoral representation of the work.

"(c) The owner of copyright in an architectural work—

"(1) shall not be entitled to obtain an injunction under section 502 restraining the construction of an infringing building or structure if construction has substantially begun; and

"(2) shall not be entitled under the provisions of chapter 5 to obtain the impoundment, seizure, or destruction of an infringing building or structure.

"(d) The owner of a building or other structure embodying an architectural work, in the absence of contractural provisions to the contrary, may—

"(1) make or authorize the making of alterations to the building or structure that enhance its utility or are necessary for its maintenance or repair;

"(2) reconstruct or authorize the reconstruction of the building or structure; or

"(3) demolish or authorize the demolition of the building or structure.".

(f) in the table of sections of chapter 1 by adding at the end thereof:

"119 Scope of exclusive rights in architectural works.".

SEC. 5. Chapter 4 of title 17 of the United States Code is amended—

(a) in section 401(a), by striking out "shall" and replacing it with "may";

(b) in section 401(b), by replacing the introductory phrase "The notice appearing on the copies" with "If a notice appears on the copies, it";

(c) in section 401(c), by replacing "The notice" with "If a notice appears on the copy, it";

(d) in section 402(a), by striking out "shall" and replacing it with "may";

(e) in section 402(b), by replacing the introductory phrase "The notice appearing on the phonorecords" with "If a notice appears on the phonorecords, it";

(f) in section 402(c), by replacing "The notice" with "If a notice appears on the phonorecords, it";

(g) in section 403, by replacing the language beginning "the notice of copyright . . ." with the following language: "such copies or phonorecords shall include a statement identifying those portions of the copies or phonorecords that constitute a work of the United States Government, in accordance with regulations issued by the Copyright Office.".

(h) by deleting section 404;

(i) in section 405 by striking the caption and replacing it with: "Notice of Copyright: Omission of notice on copies and phonorecords prior to the effective date of this Act";

(j) in section 405(a) by striking out the present language of sections 405(a)(1) through (3) and replacing it with: "Effect of Omission—The omission of the copyright notice prescribed by sections 401 through 403, as they existed prior to the effective date of this Act from copies or phonorecords publicly distributed prior to the effective date of this Act does not invalidate the copyright in a work";

(k) in section 405(b) by adding the phrase "prior to the effective date of this Act" after the phrase "the copyright notice has been omitted,";

(l) in section 406 by striking the caption and replacing it with "Notice of copyright: Error in name or date in notice on copies and phonorecords prior to the effective date of this Act";

(m) in section 406(a) by inserting "prior to the effective date of this Act" following "publicly distributed";

(n) in section 406(b) by inserting "prior to the effective date of this Act" following "phonorecords distributed";

(o) in section 406(c) by inserting "prior to the effective date of this Act" following "publicly distributed" and by adding after "provisions of section 405", "as it existed immediately prior to the effective date of this Act";

(p) in section 407(a) by striking out "with notice of copyright";

(q) in section 408(a), by striking out "Subject to the provisions of section 405(a), such" at the beginning of the second sentence, and inserting in lieu thereof "Such";

(r) in section 408(c)(2), by—

(1) striking out "under all of" and inserting in lieu thereof "under";

(2) deleting subparagraph (A); and

(3) redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively; and

(s) in the table of sections for chapter 4 by striking out the reference to section 404 and the references to sections 405 and 406 and inserting in place thereof:

"405. Notice of copyright: Omission of notice on copies and phonorecords prior to the effective date of this Act;

"406. Notice of copyright: Error in name or date in notice on copies and phonorecords prior to the effective date of this Act.".

SEC. 6. Chapter 8 of title 17 of the United States Code is amended by adding at the end of section 801(b) the following:

"In considering whether a return to a copyright owner under section 116 is fair, great weight shall be given to:

"(i) the rates in effect on the day before the effective date of this Act; and

"(ii) the rate contained in any license negotiated under the authorization of section 116(b) of this title.".

SEC. 7. This Act and the amendments made by this Act shall take effect on the same day the Berne Convention enters into force with respect to the United States.

SEC. 8. If any provision of this Act, or of title 17 of the United States Code, as amended by this Act, is declared unconstitutional, the remainder of this Act, and of title 17, and their application are not affected thereby.

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Senator DeConcini. I'm very pleased to yield to my ranking member from Utah, Senator Hatch, at this time for any opening statements.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator Hatch. Thank you, Mr. Chairman.

I appreciate that, and I welcome all the witnesses here, especially our colleagues from the House and Senate.

Mr. Chairman, at the outset I would like to commend you for scheduling this hearing on legislation to implement the Berne Convention, including S. 1971, which I have introduced for the Reagan administration. In addition, I would like to welcome, as I say, our fellow Members of Congress and, of course, Secretary Verity and Trade Representative Yeutter as well as all witnesses.

This subcommittee has worked diligently on this legislation in the past and it's very fitting that we continue this effort today. With the spirit of cooperation that has prevailed under Chairman DeConcini's leadership, I have high hopes that several important issues can be resolved and that this legislation can be enacted.

Ratification of the Berne Convention would extend copyright protections beyond our borders to the worldwide coverage provided by 76 current signatories to the multilateral treaty. Testimony by the late Secretary Malcolm Baldridge indicates that in 1984 copyright industries lost as much as $1.3 billion to piracy in only 10 selected countries. This underscores the stake of the United States in enhanced international protections for intellectual property.

The major question to be answered before the United States ratifies the Berne Convention, however, deals with the moral rights required by article VI of the 1971 text. I can certainly understand that magazine publishers, movie producers, and others would be subject to great volumes of litigation if the work-for-hire doctrine were abrogated or if every minor editing function required an author's consent. On this point, I would note that the Reagan administration and a growing body of international legal scholarship find current Federal and State law perfectly adequate for protection for an author's right to be acknowledged and for an author's right to object to a modification of artistic works.

Indeed, S. 1971, the administration's bill, clarifies that it will neither "enlarge or diminish" rights as protected by current Federal and State law. This would mean that current copyright laws and practices would not be altered now or in the future by implementation of Berne.

If there remains any question on this point after our hearings, then I would be anxious to work with you, Mr. Chairman, and others on this committee to establish that this action is not intended to alter current copyright practices.

As I perceive our actions, we intend to enhance international protections for copyrights, not to interfere with existing domestic copyright relationships. With this objection in mind, I look forward to these hearings and look forward to working on this legislation, and appreciate, again, your leadership in this matter.

Senator DeConcini. Thank you, Senator Hatch.

I want to yield to the Senator from Vermont, Senator Leahy who was the ranking member of this committee in the 99th Congress, who did a tremendous job in raising the awareness of this subject matter along with Senator Mathias.

Senator Leahy?

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator **Leahy**. Thank you very much, Mr. Chairman.

I applaud you, also, for having this hearing this morning. It's important not only for the copyright law, but also for American competitiveness in the world marketplace of today and tomorrow.

Our overall trade picture has been gloomy, but the copyright community of America provides one bright spot. This sector of our economy constantly outsells the foreign competition and boosts a $1.5 billion trade surplus. I think our committee can give a great boost to those Americans who introduce books, computer software, records, movies, and other copyrighted materials into the global marketplace. We can do so by acting on legislation that will enable the United States to join the most prominent and effective mechanism of defending copyright throughout the world: the Berne Convention.

For over 100 years the Berne Convention has provided the framework for international copyright relations. For most of that time, differences between U.S. law and Berne Convention standards have kept our Nation from joining the Convention. But in the last two decades changes in American law and in the Berne standard have narrowed that gap. I think now is the time that we remove the last remaining obstacles.

I encourage my fellow Senators to support the minimalist approach to Berne implementation, which would make only those changes to our copyright law that are necessary in order to comply with Berne. In this legislation we should preserve to the greatest extent possible the rules and assumptions under which the American copyright community has operated so successfully.

I've followed that approach in drafting my Berne implementation bill, S. 1301. As I understand it, Senator Hatch's bill proceeds from the same assumption.

A quick glance around this room reflects the importance of enacting Berne implementing legislation. I welcome the administration witnesses, in particular Secretary Verity and Ambassador Yeutter. Their presence demonstrates just how important Berne is to the effort to enhance U.S. competitiveness in world trade.

I also welcome my friends from the House, Chairman Kastenmeier—and Congressman Moorhead will be here, too. We're going to benefit greatly from the record compiled during their subcommittee's 6 days of hearings and from their indepth consultations with experts from Berne countries.

As background to this morning's testimony, we can hear the clock ticking. The committee's heavy schedule of judicial nomination hearings has made it hard to focus on Berne so far this Congress. Fortunately, this subcommittee compiled a comprehensive hearing record in this issue during the last Congress. The chairman has mentioned that I had the opportunity of being the ranking member when McC. Mathias started that ball rolling.

It now appears that the goal of Berne adherence is within reach. With the leadership of Chairman DeConcini and the best efforts of all interested parties, I'm optimistic we can pass Berne legislation this year.

There are a few controversial aspects of the debate on matters ranging from copyright formalities to moral rights. These are not minor issues. They are valid and significant issues, but they shouldn't obscure the broad consensus both on the desirability of U.S. adherence to Berne and on the legislative means to achieve that goal.

So I hope that we can keep our eyes on that goal, try to avoid contentious debate that can wait another day. That doesn't mean we won't have those debates on those other issues, but let's go for Berne and then let's go and discuss these other issues. I think that's the best strategy for taking the final steps to bring the United States into the Berne Convention in what's really very limited time left in this Congress.

Thank you, Mr. Chairman.

Senator **DeConcini**. Senator Leahy, thank you very much.

We'll move right ahead. We have Secretary Verity and the U.S. Trade Representative, Mr. Yeutter, and Mr. Wallis on our second panel. Therefore, we're going to go now to Representative Robert Kastenmeier, chairman of the subcommittee on the Judiciary Committee in the House that has done a tremendous job in this area.

Bob, we welcome you here and thank you for taking the time to be with us and counsel us on moving along the same road that you have done so well.

STATEMENT OF HON. ROBERT KASTENMEIER, A U.S. REPRESENTATIVE FROM THE STATE OF WISCONSIN

Mr. **Kastenmeier**. Mr. Chairman, I'm delighted to be invited by you and to be here today with you and with Senator Leahy and Senator Hatch and members of your subcommittee.

At the outset, Mr. Chairman, I regret to say that my colleague, Mr. Moorhead, who is the prinicipal sponsor of one of the bills before the House, is not able to be here this morning as he had dearly hoped. As a result, in his behalf, I might read from a card I have here, as follows:

> Mr. Chairman, members of the subcommittee, I ask unanimous consent that my full statement appear in the record immediately following the statement of my subcommittee chairman, Mr. Kastenmeier. I'm sorry I was unable to be here in person. I appreciate your invitation to participate in these important hearings—Carlos Moorhead.

Senator **DeConcini**. That will appear in the record, Chairman Kastenmeier.

Mr. **Kastenmeier**. I also compliment the chairman on assembling really an outstanding list of witnesses this morning, most of whom we had heard, but not necessarily on any single morning. You have those who have expertise, the competence both in and out of Government that I think, as they have guided us, can guide you. They are the experts I do not claim to be.

I do, Mr. Chairman, chair your companion committee in the House that has jurisdiction over patents, trademarks, and copyrights and have worked on the subject for many years. We have just completed our examination of this legislation to permit the adherence of the United States to the Berne Convention. We have had 6 days of hearings and have had a number of days devoted in consultations in Europe with experts representing Berne nations.

I would like to cover two subjects this morning, Mr. Chairman: first, the overall policy of U.S. adherence to the Berne Convention and, second, necessary amendments to American copyright law as we currently have it.

I, too, join those who believe that adherence to the Berne Convention can be accomplished with only minimal changes to the U.S. law, and I, therefore, support the goal of U.S. adherence using the minimalist approach. The United States, perhaps it can be said, has chosen not to join the Berne Union in years past because we perhaps did not then want for our society the sort of copyright laws that the Convention appeared to require.

When I introduced H.R. 1623, I observed that amending our law would be an uphill climb; that the changes which seemed to be required might be relatively few, but for sensitive parts of compromises in the 1976 act. Our copyright law dealing with complex commercial matters and sometimes first amendment values is not easily amended.

The process we have just concluded has persuaded me that it is possible to enact implementing legislation for Berne adherence which satisfies these standards of the treaty, maintains the essential balance of rights and privileges under the 1976 Copyright Act, and promotes the public interest.

The relationship of Berne adherence to the promotion of U.S. trade is clear. Our popular culture and information products have become precious export commodities of immense economic value. That value is badly eroded by low international copyright standards. Berne standards are both high, reasonable, and widely accepted internationally. Lending our prestige and power to the international credibility of those standards will promote development of acceptable copyright regimes in bilateral and multilateral contexts.

I'm personally concerned about the danger of setting international standards, copyright standards, through trade agreements in GATT negotiations which, however desirable to particular private interests, may be higher than those of domestic law. I think making the Convention a centerpiece of our thinking about international copyright standards would be a check against these excesses.

Proponents of legislative change should show that their proposal can fit harmoniously within existing legal framework without violating existing principals or concepts. Congress should be consistent in its decisionmaking. It makes good sense for us to build international copyright policies and rules around a treaty whose terms are closer related to modern standards of protection now imbedded in our own copyright law.

As to implementing legislation, it should be acknowledged that the House and Senate have been working jointly and cooperatively during the past two Congresses. The consensus that started with the development of the report on the Ad Hoc Committee on Adherence to the Berne Convention gathered momentum, and substantive issues were refined with the introduction of a bill, as has been pointed out, in the last Congress by Senator Mathias.

An arm of the Congress, the Copyright Office, has been of tremendous assistance in drafting proposals and refining debate. The executive branch—through the Departments of State and Commerce and the United States Trade Representative—has been a constructive player especially in identifying the trade relevance of Berne.

In short, my bill, the administration proposal in both H.R. 2962 and Senator Hatch's bill, and Senator Leahy's bill, are all products of intense discussions and debates in meetings and hearings among the copyright and educational communities.

Second, all parties share the conclusion that the Berne Convention is not self-executing and some action by Congress is necessary. Looking at all of our bills, there is a striking consensus. We are all agreed that any legislation should be minimal because the differences between our law and Berne are minimal. Efforts to perfect this feature or that feature of our copyright law unnecessary to achieve Berne membership can and should be deferred for another day. The bills need not be retroactive and the public domain should not be disturbed.

Our House inquiry has shown that there are four specific areas that merit attention: the compulsory license for performance of nondramatic musical works in jukeboxes, the protection of architectural works; formalities; and the moral rights of authors.

The performing rights societies and the jukebox operators, with respect to the compulsory license, have on the matter of Berne put aside their deep-seated differences and are prepared to accept the revisions of the present law along the essential lines proposed in all of the bills.

With respect to architectural works, the protection of architectural works is a special matter. We have, candidly, not decided on the best approach to take. I would like to share with you my own assessment of the problem.

I am concerned about moving precipitously in a matter which touches very fundamental lines long drawn in our copyright law with respect to the nonprotection under copyright of creativity more appropriate to design or patent protection. I'm simply not satisfied we know enough to legislate with confidence. Whether we should extend substantial protection to architectural and materials relating to architecture under the general category of pictorial, graphic and sculptural works subject to all the limitations applicable to such works can be considered, I think, after adherence to Berne. This consideration can be made in the context of design legislation, by a specially appointed commission or by appropriate Government agencies.

With respect to formalities, the central feature of Berne is its prohibition of formalities. Elimination of formalities is perceived not only as augmenting authors' rights, but also as instrumental to U.S. trade interests. We are all in agreement that the copyright notice requirement must be eliminated. Again, the library and education communities have joined with the authors and proprietors in agreeing that such a step can and should be taken.

One remaining area of informalities, involving a point of disagreement, concerns the need to remove the requirement of registration as a precondition to an infringement suit. Some have urged that this requirement of our law is a Berne-proscribed formality. Others have doubted this conclusion. In my opinion, and I agree with the Register of Copyrights, that under a minimalist approach our law on this point need not be amended.

With respect to the last issue, moral rights, in order to stimulate discussion, I proposed a moral rights provision in my bill. I did stimulate discussion. We heard from creators, producers, employers, directors, writers, and artists. Based on the hearings we've had and hearing these parties and many others, I've come to respect the view that the best course of action is to avoid statutory treatment of moral rights in the context of Berne. This conclusion rests in part on the political reality that legislation with a moral rights provision simply will not pass and, further, amendments to the Copyright Act are not mandated in order to secure U.S. adherence to Berne. This opinion is not based on any hostility to moral rights of authors.

Most observers agree that common-law doctrines including defamation, privacy, publicity, and unfair competition contain basic elements of moral rights. Several of the economic rights in the present Copyright Act, such as derivative works, permit authors to achieve many moral rights objectives. Also, the Lanham Act and State common law are rich sources of law on this point.

For the Congress now to attempt to create statutory moral rights at the Federal level and thereby preempt the growth of State law would require complex legal surgery. To take only so much from the law of libel as is necessary for moral rights protection and leave the rest of that doctrine at common law intact and unimpaired, to carve out national rules of the convoluted rules of unfair competition or publicity and leave the remainder clear would be very difficult. I believe they are not necessary now.

In conclusion, in 1976 we revised our law to move away from many of the rules which kept us apart from Berne. The 1976 act was enacted with an eye on Berne, its net effect being to bring Berne adherence within reach.

Today the climatic variables are all favorable for U.S. adherence. There is a strong political consensus in favor of U.S. membership.

I am joined by my ranking minority member and will be followed by other high-ranking officials from the executive branch in this respect. We all recognize the need to cooperate, to put aside particular agendas, to move simple, direct, implementing legislation quickly to enactment. Timing is essential. We do not have altogether that much time.

We can achieve a signal step in the history of American intellectual property development by rapidly moving to enact implementing legislation, ratify the Convention, and deposit our instrument of accession by the end of the year. I believe we must stride mightily to do so while the weather remains good.

I thank you, Mr. Chairman.

[The prepared statements of Mr. Kastenmeier and Mr. Moorhead follow:]

TESTIMONY OF

ROBERT W. KASTENMEIER
CHAIRMAN
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE,
HOUSE COMMITTEE ON THE JUDICIARY

ON U.S. ADHERENCE TO THE BERNE CONVENTION

BEFORE THE SUBCOMMITTEE ON PATENTS,
TRADEMARKS AND COPYRIGHTS,
SENATE COMMITTEE ON THE JUDICIARY

FEBRUARY 18, 1988

Mr. Chairman, and Members of the Subcommittee, I am pleased to appear before you today. My name is Bob Kastenmeier and I chair the sister subcommittee in the House of Representatives that has jurisdiction over patents, trademarks and copyrights. I have worked on copyright reform in the Congress for over twenty years.

My subcommittee -- the Subcommittee on Courts, Civil Liberties and the Administration of Justice -- has just completed its examination of legislation to permit the adherence of the United States to the Berne Convention (the Paris Act of 1971). I will be brief, sharing with you what I have gleaned from six days of legislative hearings, five working days of discussions in Europe with leading international copyright experts, staff studies and numerous discussions and submissions from interested individuals and organizations. Indeed, we have just received from the World Intellectual Property Organization the unedited transcript of our Roundtable Discussions with the foreign consultants and I am delighted to make it informally available to your Subcommittee along with the transcripts of our hearings in the House.

I offer my thoughts without pretense or illusions, as an elected representative of the people. Ben Franklin is supposed to have said, "From every man I learn something. From most, what not to do." I will cover two subjects: first, the overall policy question of U.S. adherence to the Berne Convention; and second, the specific amendments that are necessary to current American copyright law.

I. The Question of Adherence to the Berne Convention.

Lest there be any uncertainty, let me say at the outset that the adherence of the United States to the Berne Convention can be accomplished with only minimal changes to United States law. I support the goal of U.S. adherence, using the minimalist approach.

The United States has chosen not to join the Berne Union in the past because we did not want for our society the kind of copyright laws that the Convention required. There has never been any great doubt that Berne adherence, in the abstract, seemed worth pursuing. The questions have always been very concrete ones: what changes does Berne require us to make to our copyright laws? Can we live with such changes? Will they hurt important social interests? And certainly before passage of the Copyright Reform Act of 1976, the answers to these questions kept us out of Berne.

When I introduced H.R. 1623, I observed that, given past controversies, amending our copyright law to permit entry into the Berne Union would be an uphill climb; that the changes which seemed to be required might be relatively few, but were sensitive parts of careful compromises in the 1976 Copyright Act. Copyright laws, dealing with complex commercial matters and First Amendment values, are complicated and amendments are not made easily.

The process we have just concluded in the House has persuaded me it is possible to enact implementing legislation for Berne adherence which satisfies the standards of the treaty, maintains the essential balance of rights and privileges under the 1976 Copyright Act and promotes the public interest.

The reasons why adherence to Berne is sound and in the overall national interest can be summed up simply: international leadership, trade and structure.

The United States is a major actor in a highly interdependent world. In an information era, all countries are experiencing a rapid internationalization of legal norms and ways of doing business. It is highly desirable to build an international legal consensus on the basic rules of authors' rights when we share those essential rules with our closest trading and cultural partners. The states of Europe and Latin America, Japan, Canada and many developing countries have long accepted Berne. Our copyright holders have enjoyed fine protection in most of those countries. I learned during our Roundtable Discussions in Europe that these states want us in the Berne Union -- quite badly.

The relationship of Berne adherence to promotion of U.S. trade improvement is clear. Our popular culture and information products have become a precious export commodity of immense economic value. That value is badly eroded by international copyright piracy. Berne standards are both high, reasonable and widely accepted internationally. Lending our prestige and power to the international credibility of those standards will promote development of acceptable copyright regimes in bilateral and multilateral contexts.

I must confess, however, personal concern over the danger of setting international standards through trade agreements and GATT negotiations which, however desirable to particular private interests, are higher than those of our domestic law. Adherence to Berne and making the Convention a centerpiece of our thinking about international copyright standards is, in my opinion, a check against such excess as well as a strengthening of sound copyright principles. Substantial harmony between U.S. law and the Convention was, of course, achieved by the enactment of the 1976 Copyright Act.

And, by structure, I mean, that proponents of legislative change ought to show that their proposal can fit harmoniously within the existing legal framework without violating existing principles or basic concepts. Congress should be consistent in its decision-making. As regards Berne adherence, it makes eminent good sense for us to build international copyright policies and rules around a treaty whose terms are closely related to the modern standards of protection now embedded in our own copyright law.

With the advent of widespread satellite distribution of art and information, high-speed means for the duplication and global distribution of works, the internationalization of investment and creativity itself, the demands upon the international legal system to adapt are daunting. In this sense, adherence to Berne manifests the maturation of our international copyright attitudes. Working within this framework, the United States can cooperate with other nations to create for the next century the kind of balanced copyright system which has well served our own interests.

II. Implementing Legislation.

Now let me turn to what we have learned in the House about preparing appropriate implementing legislation.

First, it should be acknowledged that the House and the Senate have actually been working jointly and cooperatively during the past two Congresses. The consensus that started with the development of the report of the Ad Hoc Committee on Adherence to the Berne Convention, gathered momentum and the substantive issues were refined with the introduction of a bill in the 99th Congress by Senator Mathias. An arm of the United States Congress -- the Copyright Office -- has been of tremendous assistance in drafting proposals and refining the debate. The executive branch -- through the Departments of State and Commerce and the United States Trade Representative -- has been a constructive player, especially in indentifying the trade relevance of Berne. In short, my bill, the Administration proposal (H.R. 2962 and S. 1971) and Senator Leahy's bill (S. 1301) are all products of intense discussions and debate in meetings and hearings, and among the copyright and educational communities.

Second, all parties share the conclusion that the Berne Convention is not self-executing and some action by the Congress is necessary.

Looking at all of our bills, there is a striking consensus. Most fundamentally, we are all agreed that any legislation should be minimal because the differences between our law and Berne are minimal. Efforts to perfect this or that feature of our copyright law, unnecessary to secure Berne membership, can and should deferred for another day. The bills need not be retroactive and the public domain should not be disturbed.

Our House inquiry has shown that there are four specific areas which merit attention: the compulsory license for performance of non-dramatic musical works on jukeboxes; the protection of architectural works; formalities; and moral rights of authors.

1. The jukebox compulsory license. With respect to the jukebox license, our hearings disclosed that the performing rights societies and the jukebox operators have, on the matter of Berne, put their deep-seated differences aside and are prepared to accept a revision of the present law along the essential lines proposed in all the bills.

This spirit of cooperation between historic antagonists in the copyright arena is welcome and satisfying. I was struck by the fact that the ability to agree to a limited move toward voluntary licensing was in no small part due to dissatisfaction with the operation of the present compulsory license, a matter which I have asked the Register of Copyrights to examine and to report to my Subcommittee.

2. Architectural works. The protection of architectural works is a special matter. We have not yet decided on the best approach to take, but I would like to share with you my assessment of the problem.

Initially, all the bills assumed that it was necessary to introduce specifically a reference to architectural works as a subject matter of copyright and, once having done so, a number of specific exemptions and limitations had to be drafted to protect the reasonable interests of builders, consumers and the public generally. It was certainly not my intent to provide copyright protection for functional or utilitarian aspects of architecture. In general, any protection for architectural works must be subject to the limitations which extend to other pictorial, graphic and sculptural works and therefore preserve the "idea-expression dichotomy."

Despite the original assumption, during House hearings convincing testimony suggested that present U.S. copyright law already protects works of architecture and works relating to architecture (such as blueprints and models) so as to meet the general standards of the Berne Convention. Therefore, under a minimalist approach, we might not have to legislate at all. Very little testimony addressed the question of appropriate protection for architectural works and, although representatives of architects approved of the proposed step, with necessary amendments, it did not appear to be a crucial matter to them.

I am concerned about moving precipitously in a matter which touches very fundamental lines, long drawn in our copyright law, with respect to the non-protection under copyright of creativity more appropriate to design or patent protection. I am simply not satisfied that we know enough to legislate with confidence. Whether we should extend substantial protection to architecture and materials relating to architecture under the general category of pictorial, graphic and sculptural works, subject to all the limitations applicable to such works, can be considered after adherence to Berne. This consideration can be in the context of design legislation, by a specially appointed commission or appropriate governmental agencies.

3. Formalities. As you know, the central feature of Berne is its prohibition of formalities. Elimination of formalities is perceived as not only augmenting authors rights but also as instrumental to U.S. trade interests. U.S. copyrighted products should not face unnecessary impediments to the acquisition of copyright rights overseas. We are all in agreement that the copyright notice requirement must be eliminated. Again, library and educational communities have joined with authors and proprietors in agreeing that such a step can and should be taken.

The one remaining area in formalities that is a point of disagreement concerns the need, under Berne, to remove the requirement of registration as a precondition to the bringing of an infringement suit. Some proprietary interests have urged that this requirement of our law is a Berne proscribed formality; others have doubted this conclusion. In my opinion -- and that of the Register of Copyrights -- under a minimalist approach, our law on this point should not be amended.

The objective of maintaining the flow of materials to the collections of the National Library through registration, the evidentiary use to the judicial system, the usefulness of the examining process, and the public interest of a comprehensive and open registry relating to the existence, ownership and exercise of copyrights all argue for continuation of this registration incentive.

4. Moral rights. Finally, there is the question of moral rights. As you know, in order to stimulate discussion, I

proposed a moral rights provision in my bill. I did stimulate discussion. We heard from creators, producers, employers, directors, writers and artists.

Based on hearing the divergent views of the interested parties, I have come to respect the view that the best course is to avoid statutory treatment of moral rights in the context of Berne. The matter should be left to the development and application to the common law and intellectual property doctrines ancillary to copyright, whether Federal or State in nature.

This conclusion rests in part on the political reality that Berne legislation with a moral rights provision simply will not pass. Further, I do not believe such Federal rights are mandated in order to secure U.S. adherence to Berne. This opinion is not, parenthetically, based on any intellectual hostility to moral rights of authors.

You will hear a lot about moral rights, so I will explain further what I mean. The vast majority of witnesses testifying agreed that common law doctrines, including defamation, privacy, publicity and unfair competition contain the basic elements of moral rights. Several of the economic rights under the present Copyright Act (such as derivative rights) permit authors to achieve many moral rights objectives. Moreover, the Lanham Act and State common law are rich sources of law in the area.

For Congress now to attempt to create statutory moral rights at the Federal level -- and thereby pre-empt the growth of State law -- would require extraordinarily complex legal surgery. To take only so much from the law of libel as is needed for moral rights protection and leave the rest of that doctrine at common law intact and unimpaired; to carve national rules out of the convoluted rules of unfair competition or publicity and leave the remainder clear -- these are very difficult things to do. And they are not necessary now.

III. Conclusion

For a century, the United States and the states of the Berne Union have pursued alternative paths in their international copyright policies. The different routes, as a historical matter, are attributable to two things. First, until the close of the Second World War, the United States thought of itself as a copyright importer, a user of works -- with all of the caution and hesitancy that every buyer brings to any seller. Second, we were particularly attached to legal norms, principally relating to formalities and term, that diverged from the rest of the world.

Both circumstances are now profoundly changed. The United States is the principal copyright-exporting nation of the world. And, after over 30 years of hard work, in 1976 we revised our law to move away from many of the rules which had kept us apart from the Berne Union. The 1976 Act was enacted with a weather eye on Berne, its net effect being to bring Berne adherence within reach.

Today, the climatic variables are all favorable for U.S. adherence. There is a strong political consensus in favor of U.S. membership. I appear with the ranking minority Member of my subcommittee, and will be followed by high-ranking officials from the executive branch. We all recognize the need to cooperate, to put aside particular agendas and to move simple, direct, implementing legislation quickly to enactment. Timing is essential and we do not have all that much time. We can achieve a signal step in the history of American intellectual property development by rapidly moving to enact implementing legislation, ratify the Convention and deposit our instrument of accession by the end of this year. And, I believe we must strive mightily to do so, before the weather changes.

My subcommittee and I are at your disposal in your difficult work ahead. We all toil under many pressures. Yet, I hope you derive as much satisfaction as I have from knowing that this is truly historic business we are about.

February 18, 1988

STATEMENT OF THE
HONORABLE CARLOS J. MOORHEAD
BEFORE THE SENATE SUBCOMMITTEE
ON PATENTS, COPYRIGHTS AND TRADEMARKS
ON H.R. 2962
THE BERNE CONVENTION
IMPLEMENTATION ACT

On July 15, 1987 Congressman Ham Fish and I introduced H.R. 2962, a Reagan administration proposal for implementation of the Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris on July 24, 1971. Two other proposals have been introduced in the 100th Congress, H.R. 1623 by Representative Kastenmeier (D-Wis.) and S.1301 by Senator Leahy (D-Ver.) After explaining the ways that U.S. adherence to the Berne Convention will serve the national interest, I will discuss how H.R. 2962 would implement the Convention's requirements, drawing comparisons with the other two bills where appropriate.

I. Reasons for U.S. Adherence to Berne.

United States adherence to the Berne Convention is essential to secure and maintain a strong and credible U.S. presence in the fast-growing global information economy. There are compelling reasons for the United States to join.

The first and most important reason to join Berne is that it will assure the highest available level of international protection for U.S. authors and copyright holders. The Berne Union has 76 members, including virtually all of the free market countries, a number of developing nations, and several nations of the Eastern Bloc. The United States, the Soviet Union and China are conspicuously absent from this list. The United States and the Soviet Union along with another 76 nations belong to the more-recent, lower level, Universal Copyright Convention (UCC).

Berne adherence would assure higher levels of protection than the UCC. Protection under both Conventions is based on the general concept of "national treatment," that requires each member-nation to accord to nationals of other member-nations the same level of copyright protection provided to its own citizens. The national treatment obligation under the UCC is general, and its minimum levels of protection are not sufficient to deter piracy of U.S. works. While the Berne Convention is also grounded in the concept of national treatment, it has the additional requirement that generally well-specified minimum rights be guaranteed under the laws of member nations. Among these are: duration of copyright for life of the author plus fifty years, and rights of translation, reproduction, public performance, broadcasting, adaptation and arrangement.

Also, adherence to Berne will give us copyright relations with 24 countries with which we have no current relations. A twenty-fifth country, the People's Republic of China, with more than a billion users of copyrighted works, has given strong signals that it is considering adhering to Berne.

The second major reason that the United States should join Berne is that adherence is necessary to ensure effective U.S. participation in the formulation and management of international copyright policy. U.S. adherence to Berne would give our officials the right to participate fully in the administration and management of the Convention. New technologies for the transmission and use of copyrighted works have "internationalized" intellectual property to an unprecedented extent, and U. S. participation in the premier international copyright organization is essential.

Membership in Berne also will serve to strengthen the credibility of the U.S. position in trade negotiations with countries that are havens for piracy. Thailand, a Berne member, is a good example. Thai officials repeatedly point out the inconsistency of U.S. insistence on efforts by the Thai government to combat piracy, when we do not belong to Berne. They point out an inherent hypocrisy: we have so far failed to join Berne, but we urge other nations to conform to Berne standards. United States adherence can only heighten our credibility and raise the likelihood that other nations will enter the Convention or increase existing levels of copyright protection.

Berne adherence will also complement U.S. efforts to formulate an intellectual property code within the General Agreement on Tariffs and Trade (the GATT). An intellectual property code including copyright within the GATT must be drawn from the copyright standards established in the Berne Convention and adequate and effective national copyright laws. As the world's largest exporter of copyrighted works, the United States has a stake in preserving Berne's high levels of copyright protection. The United States' position for implementation of high level standards within GATT is seriously weakened unless it adheres to the Berne Convention. Moreover, it is quite possible that failure of the United States to adhere to the Convention will cause difficulties within GATT, prompting debates as to the types and levels of protection to be provided, possibly jeopardizing the success of the entire intellectual property initiative. Berne adherence is not a substitute for a GATT intellectual property code, but neither is a GATT intellectual property code a substitute for Berne adherence.

II. Implementation of the Berne Convention.

United States adherence to the Berne Convention will require minimal changes in U.S. law to implement the Convention.

H.R. 2962 makes only those changes in the copyright law that are necessary to bring U.S. law into compliance with the standards of the Convention. These changes concern copyright formalities, the jukebox compulsory license, copyright protection for architectural works, retroactivity, and moral rights.

A. Formalities of Copyright.

Many copyright experts agree that the Berne Convention does not permit formalities, such as mandatory copyright notice and registration, as preconditions to the existence, scope and duration of copyright protection. The Convention does permit, however, formalities of a procedural or judicial nature, which are not preconditions for the existence of copyright. Clearly, use of a mandatory copyright notice is incompatible with Berne, and H.R. 2962 would eliminate it by making use of a copyright notice entirely voluntary. This approach mirrors that of H.R. 1623 and S.1301. By retaining voluntary notice, all these bills acknowledge that for nearly 200 years U.S. copyright users have relied on the content of the copyright notice to distinguish protected from unprotected works, and that notice remains useful under the UCC. Notice is also one of the easiest deterrents to infringement available to copyright holders.

Under Berne, registration as a precondition to copyright protection is forbidden. Under current U.S. law, registration is not a condition for the existence of copyright. It is, however, a way to cure publication of a work without notice of copyright, without which the copyright lapses at the end of 5 years. It is also a precondition to the filing of a copyright infringement suit. H.R. 2962 would remove the former position, making use of the copyright notice voluntary, and would retain the latter provision. Experts believe that registration as a prerequisite to suit is permissible under the Berne Convention, because it is a procedural rather than a substantive formality.

S.1301 would eliminate the requirement of registration as a prerequisite to suit, but such a change is not necessary for Berne adherence. The laws of several Berne member nations, such as Argentina, Canada, and India, have procedural filing requirements necessary to obtain judicial relief. Moreover, while registration is not strictly necessary to secure copyright protection in the United States, the registration system serves valuable functions, involving the creation of a public record of claims to copyright, a reduction in litigation over copyrightability, and perhaps more important, a means for the acquisition of the Nation's creative output by the Library of Congress. The existence of a deposit requirement to maintain the integrity of the collection of a national library, but not affecting the existence of copyright, is a common feature of the law in such countries as France, the United Kingdom, and Mexico.

B. Jukebox Compulsory License.

There is no doubt that the existing jukebox compulsory license in section 116 of the copyright law is not compatible with Berne. All three bills, though differing in detail, provide for the negotiation of voluntary license agreements between performing rights societies, like the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and jukebox operators.

H.R. 2962 retains the existing compulsory license as an option if these negotiations fail. The backup compulsory license provision is consistent with Berne members' practices of using governmental bodies to arbitrate between collecting societies and users of copyrighted works. If the parties cannot reach an accord, the compulsory jukebox license will ensure survival of the jukebox industry by guarding against possible monopolistic practices of either the performing rights societies or the jukebox operators.

C. Copyright Protection for Architectural Works.

It is generally agreed that the Berne Convention requires a higher level of protection for architectural works than that provided under existing U.S. law. H.R. 2962 would raise the standards for protection without compromising practices in the real estate and construction industries. The bill provides that protection does not extend to the process or method of construction. The bill also limits the remedies available for infringement by excluding injunctive relief against an infringing building or structure if construction has substantially begun, and by providing that a court may not order the impoundment, seizure or destruction of an infringing building.

Barbara Ringer, the well-known and well-respected former Register of Copyright testified before our Subcommittee that it's not necessary to amend our copyright law in the area of architectural works in order to comply with Berne. Therefore, the major changes made by H.R. 2962 and other bills is unnecessary and may open a "can of worms". Her recommendation makes sense and we will review it closely.

D. Retroactivity.

On the issue of retroactivity, H.R. 2962 provides that adherence to the Berne Convention will not confer copyright protection on any work that is in the public domain in the United States. This approach is identical to that in H.R. 1623 and S.1301. There is general agreement among experts that Berne leaves considerable discretion to member nations in determining the degree of retroactive protection to be provided to works from other Berne member nations. Works whose full U.S. statutory term of protection has expired need not be revived to accord with the expectations of Berne Union countries with longer terms of protection. Also, under Article 18 of Berne, retroactive protection of foreign works need not be provided after the expiration of a term of protection in the country where protection is claimed. It has also been suggested that as the United States protects all unpublished works, regardless of national origin, there is a term of U.S. protection for all foreign works.

E. Moral Rights.

The issue of moral rights has raised the most vocal and the most active opposition to U.S. adherence to the Berne Convention. In testimony before the House Copyright Subcommittee the American Bar Association stated that "we fear that an issue as to moral rights is being made to appear as critical with respect to Berne adherence. We believe however, that it is a non-issue which should not be made to appear as controlling in the yes/no context of the United States' answer on Berne adherence." Article 6*bis* of the Convention requires that the legislation of member nations protect the so-called "right of paternity" --the right to claim authorship of one's works -- and the "right of integrity" -- the right to object to distortion, mutilation, or modification of the work that would prejudice the author's honor or reputation.

It has been argued that inclusion of a moral rights provision in the U.S. copyright law would create uncertainty and unpredictability in the motion picture, magazine and book-publishing industries, that depend upon assembling a number of creative works into an interdependent whole. This argument erroneously assumes that changes in U.S. law are needed to conform with Berne's moral rights obligations. H.R. 2962 reflects the view taken by many copyright experts that the totality of current U.S. law, including Federal statutes, certain common law tort and contract rights, and some state statutes, provides sufficient protection for the rights of paternity and integrity to comply with the Convention. The U.S. copyright law grants to authors the exclusive right to prepare or to authorize others to prepare derivative works, which can protect against unauthorized distortion, mutilation, or modification. Another Federal statute, section 43(a) of the Trademark Act of 1946, prohibits false designation of origin in intellectual and artistic works, which protects the right of paternity. State jurisprudence on the common law of contract, defamation, right of publicity, and invasion of privacy, safeguards individual authors from damage to their honor and reputation arising ~~from distort~~ion, mutilation or modification of their works. Dr. Arpad Bogsch, the Director General of the World Intellectual Property Organization, has concluded that "The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes." Thus, H.R. 2962 does not include a provision for the protection of moral rights under the copyright law. Indeed, section 2(a)(4) of the bill states unequivocally that the U.S. copyright statute does not include all elements of moral rights protection.

In testimony before the House Copyright Subcommittee Peter Nolan, Vice President and counsel of the Walt Disney Company stated that:

> "Legislation relating to Berne adherence should include, as an absolutely critical element, provisions similar to those found in Congressman Moorhead's bill that state:
>
> (1) the Berne Convention is neither self-executing nor directly enforceable in the United States;
>
> (2) the Copyright Act does not provide any author with a paternity right;
>
> (3) the existing law and the implementing legislation satisfy the requirements for Berne adherence;
>
> (4) changes in state or federal law are not necessary to meet our obligation under the Convention; and
>
> (5) except as specifically granted in the implementing legislation, no rights may be enlarged as a result of adherence to the Berne Convention."

It also has been claimed that, because of doubts as to whether the Berne Convention is self-executing, U.S. adherence would mark the first step towards unchecked extension of moral rights protection through expansive judicial interpretation of the treaty, irrespective of whether a moral rights provision appears in implementing legislation. This would not be possible under any of the proposed bills. All three bills expressly state that the Convention is not self-executing, and that U.S. obligations may be met only by appropriate domestic law.

With regard to moral rights, the Subcommittee has received testimony from many experts including representatives of 11 countries who are members of Berne and their opinions are almost unanimous, in that Berne is not self-executing and present U.S. law concerning moral rights is adequate and no change in law or practice need be made. The Congress can adopt legislation changing the law regarding moral rights, but it can do that at any time, regardless whether or not the U.S. adheres to Berne. And as a practical matter, in my opinion there is very little support among the Judiciary Committee members to make substantive changes in U.S. law regarding moral rights. Therefore, to refuse to join Berne based on some fear that it will change moral rights law in this country is unfounded and without any basis in fact.

III. Conclusion.

The Berne Treaty provides the highest form of copyright protection in the world. The United States is the largest exporter of copyrighted works. It only makes sense to provide American creators with the best protection available. If the U.S. joins Berne we will have immediate and direct contact with 24 countries wherein we have no contact today. Some of these countries are serious pirates of U.S. copyrighted works. These pirates will be forced to deal with the U.S. directly. The Congress is presently very concerned with the U.S. trade imbalance and the number of our trading partners who send the U.S. billions of dollars of their goods but refuse to permit the U.S. to export its goods into their country. It's not protectionist to protect American inventions, American technology and American creativity. This creativity represent the work product of many U.S. citizens and they have every right to the maximum protection of that work product and this is an important factor in the Congress' decision to join Berne.

The Cabinet Council on Commerce and Trade unanimously recommended Berne adherence as an important international intellectual property objective. President Reagan endorsed this recommendation in his State of the Union address on January 27, 1987. To emphasize its importance, he sent the former Secretary of Commerce Mac Baldrige, U.S.T.R. Clayton Yeutter and Under Secretary Wallis to testify before the House Judiciary Subcommittee. Due to the strong interest of Bob Kastenmeier and others this legislation has a chance of enactment. It is important legislation but because of its nature, it would be easy to stop unless the White House, the Departments of State and Commerce, the Copyright Office and the private sector get behind it one hundred percent. The time is right, the need is there and they have the attention of the 100th Congress.

Senator DECONCINI. Chairman Kastenmeier, thank you. I appreciate your attendance here and thank you for submitting Representative Moorhead's statement.

I was going to ask you some questions on including a moral rights provision, but you certainly articulated your position very clearly and the reason you included a moral rights provision in your legislation. So I really don't have any questions. You answered them for me. Thank you very much.

Senator Hatch.

Senator HATCH. I have no questions. I want to thank you for your testimony, Bob. It's good to have you over here, and we appreciate the leadership you're providing in the House.

Mr. KASTENMEIER. Delighted, Senator Hatch.

Senator DECONCINI. Thank you. Excuse me. Senator Leahy? I'm sorry.

Senator LEAHY. I have only one very brief one, Mr. Chairman. I may have missed this. I had to go out and take a phone call.

What is the schedule that you see in the House on markup and all?

Mr. KASTENMEIER. Senator Leahy, we have concluded our hearings altogether, and I would think within the next 2 to 4 weeks we might be prepared to move to markup. From my own testimony, I'm fairly sanguine that we can accommodate differences among the several bills.

As you know—and there is a side-by-side available for us all—the three versions are quite similar. As long as the moral rights question does not surface in a sense of separately commanding a special debate, and perhaps divisive attention, I think it can be moved. The only remaining question, as I've suggested, is what to do with architectural rights as we have put them in all bills, but the last hearings we've had on architectural rights suggest that they may be troublesome; that we may not be as prepared as we thought with respect to that. Taking a minimalist approach, it may be desirable—at least that's what we're considering—not to have architectural rights as a part of this in terms of changes in American copyright law.

Once we have resolved that question, I think we're prepared to proceed to enactment. I think we do have consensus.

Senator LEAHY. Thank you.

Thank you very much, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Leahy.

Thank you very much, Chairman Kastenmeier.

Mr. KASTENMEIER. Thank you.

Senator DECONCINI. We'll now have our panel: Secretary William Verity, the Secretary of Commerce.

Thank you, Mr. Secretary for being with us. If you'd come and be seated, we'd appreciate it.

We also have Ambassador Yeutter, the U.S. Trade Ambassador, and the Under Secretary of Economic Affairs, Mr. Allen Wallis.

We'll lead off with Secretary Verity and then Mr. Yeutter and then Mr. Wallis. Because of Mr. Wallis' commitment to do some chores for the Secretary, we will ask him questions first and excuse him.

Secretary Verity, thank you for being with us. If you would summarize your statement, your full statement will appear in the record.

STATEMENT OF HON. C. WILLIAM VERITY, THE SECRETARY OF COMMERCE

Secretary VERITY. Good morning, Mr. Chairman.

Although we have prepared what I think is a splendid report for you, I would like to summarize it in the essence of time.

Senator DECONCINI. Thank you.

Secretary VERITY. That I will do.

I would like, however, to have permission to include the longer statement and also one prepared by Don Quigg who is Commissioner of Patents and Trademarks. I will include his statement with that.

Senator DECONCINI. Without objection, Mr. Secretary, it will appear in the record in the full form.

Secretary VERITY. Let me start by assuring you that the administration remains as committed to joining Berne as it was last July when Mac Baldrige and my colleagues testified in the House. Let me also assure you that Commerce will remain the same strong voice for intellectual property protection that it was under Mac Baldrige's leadership.

Turning to the issue at hand, there is absolutely no justification for the United States to remain outside the Berne Union. No country has as much to gain as we do for a world order that respects the rights of authors and artists. Our copyright industries account for about 5 percent of our GNP and return a trade surplus of more than $1 billion. All over the world people enjoy our music, our movies, our videos, and our books and magazines. They run their computers with our software. With these items, we export not just our goods, but a large bit of national character as well.

But much of this is in jeopardy. Piracy remains a problem costing us well over $1 billion annually. Compulsory licensing or other forms of legalized blackmail can lead to lost sales, lost markets, or loss of our technological edge. These problems won't go away. Many countries, and not just the poor ones, feel they must have unimpeded access to U.S. works if they can ever hope to compete in a world of rapid technological change.

Also, changes in audiovisual and telecommunications technology bring us better products and more of them. They give people the ability to enjoy copyrighted works in ways that could not be imagined only a few years ago and, as such, give rise to new copyright issues that the nations must work together to solve.

In short, Mr. Chairman, copyright issues are so important, so complex, and so international in scope that it is unconscionable for the United States to remain apart from the Berne Union. We should be active participants working to make sure that its standards adequately protect U.S. artists and authors and those who take risks in bringing what they create to the market.

By adhering, we solve this problem. We gain copyright relations with 24 countries, including copyright troublespots such as Egypt and Turkey. We deny countries the tactical, diplomatic advantage of using U.S. non-adherence to deflect attention from their own copyright inadequacies. We stop wasting millions of unnecessary backdoor publications.

Mr. Chairman, we are so close. In general, the various bills all agree in principle, differing only in details. One detail, however, stands out. Because Berne recognizes an author's moral rights, some publishers that freely use works that they have hired others to create are worried that adherence could affect their commercial practices and their ability to edit their products. However, most scholars believe that U.S. law will not have to be changed.

My colleagues and I are particularly pleased to hear what you just heard from Chairman Kastenmeier, who shares this view and considers Berne adherence a national priority. In short, adherence is the right thing for a great nation. There is no reason for further delay.

Thank you, Mr. Chairman.

[The prepared statements of Secretary Verity and Mr. Quigg follow.]

STATEMENT OF
SECRETARY OF COMMERCE
C. WILLIAM VERITY

Mr. Chairman and members of the Subcommittee, I am pleased to be here today to urge Congress to make those changes to U.S. copyright law that will permit the United States to adhere to the Berne Convention for the Protection of Literary and Artistic Works.

Last July Secretary Baldrige testified on this initiative as one of his last official acts. I think it is fitting that my first formal appearance on legislation before a committee is on the same subject.

On the simplest level, it gives me a chance to affirm that the Administration remains committed to joining Berne. But more than that, it gives me an opportunity to pledge to you publicly that as long as I am in charge, the Department of Commerce will remain the same voice for strong intellectual property protection at home and abroad that it was under Mac's leadership.

That pledge should not be taken to imply that I consider myself an expert in the nuances and intricacies of intellectual property law. Commerce has others for that purpose and one of the best, Commissioner Donald Quigg, has a supplemental statement of his own. However, even those without Don's expertise can readily appreciate what the Berne issue is all about.

The quality of the copyright protection that a nation provides tells us, in its own way, as much about that nation's character as its civil rights, environmental, educational, health, housing, or any of the other sets of laws associated with national values and aspirations.

That is, all societies ultimately must make a choice: do they wish to be known for encouraging their citizens to apply their creative talents to the production of paintings, music, sculpture, cinema, literature, computer software, or various other works that make our lives so much fuller and richer? Or do they wish to be known as nations that steal what others create?

For most of our first century of nationhood, we were takers. We stole what others created. Nobody could match us in our disdain for the rights of foreign authors such as Dickens, Thackeray, or

Gilbert and Sullivan. But we soon learned that our behavior came at a cost as other nations denied our own authors the rights we had denied theirs. When nations behave that way, all of them are net losers.

Since that time, we have corrected our law and we have benefited handsomely from an international order that generally respected the rights of artists and authors of all nations and those entrepreneurs who took the risks of bringing new works to the marketplace.

All over the world, people are enjoying the fruits of American creative forces that effective copyright laws have nurtured. They dance to our music, they laugh or cry at our movies, they thrill to our videos, they learn from our books, they run their computers from our software. We profit financially from this, but that is only part of what we gain. To the extent that this creative output is itself a reflection of our national character, we are exporting a bit of ourselves as well and what we represent.

Partly as a result of this, our copyright and information-related industries have, by some estimates, grown to the point where they account for more than 5% of GNP and return a trade surplus of more than $1 billion.

Unfortunately, much of this is in jeopardy today. Piracy remains a problem. In 1984, it cost U.S. industries more than $1.3 billion in only ten countries. Some countries impose onerous conditions on protection or doing business. Others employ statutory licensing systems which in theory apply equally to foreign and domestic creators but which affect U.S. interests disproportionately, given the greater number of, and demand for, works by U.S. authors.

To some degree, the reasons for this situation are easy to discern. Greed - a desire to cash in on what others have produced - is part of the problem, but only a part. To a greater degree, the explanation is that the pace of technological change is so swift that lesser developed countries fear they will be left further and further behind if they do not move rapidly to build industries that will enable them to compete in the information marketplace in the years ahead.

That fear increases the incentive to take our creative works. It often means that U.S. firms are faced with the choice of submitting to compulsory licensing or other forms of legalized blackmail or giving up a potentially valuable market.

The Administration has taken steps to improve the international protection of copyrights. Bilateral discussions with Indonesia, Malaysia, Singapore and Taiwan have led to improvements. Following a successful "Section 301" action, the Republic of Korea has a new copyright law that protects U.S. works. Even Brazil has adopted copyright protection for computer programs.

As Ambassador Yeutter will tell you, on the multilateral front we are working in the new round of GATT negotiations to develop a way to enforce compliance with high-level intellectual property standards. In the copyright area, those standards are largely drawn from the Berne Convention. To succeed, we must present our case in the strongest possible terms. Instead, we find that despite the soundness of U.S. copyright law, our failure to adhere to Berne constantly weakens our credibility.

With all this in mind, one would think that the United States would be in the forefront of efforts to secure support for an international convention that gives the highest degree of copyright protection and that other nations would have to be dragged kicking and screaming to the table. Ironically, this is not so.

Why is this? When there is so much to be gained from international cooperation on copyright matters, why does the United States deny itself the opportunity to obtain copyright relations with twenty-four countries with which we currently have no such relations, some of which - Egypt and Turkey in particular - are emerging as copyright trouble spots?

And the questions don't stop there. Why do we deny ourselves the opportunity to affect directly the policies adopted by the most prestigious of international copyright bodies? Why, as Ambassador Yeutter will describe, do we give other nations the tactical diplomatic advantage of using our nonadherence as a means of deflecting attention from their own copyright inadequacies?

I would like to be able to say that the reason is selfishness or use some equally colorful term. In fairness, I cannot. Although intellectual property initiatives are often resisted by persons who wish to go on profiting financially from deficiencies or loopholes in the law at the creator's expense, that is clearly not the case here.

Here we are dealing with something very different. Here the problem stems from the fact that while our copyright law gives authors and artists the economic rights to profit from the performance, reproduction or distribution of their works, Berne recognizes certain "moral" rights to control what is done with the work. These additional rights are viewed as "natural" rights, not "man-made" ones. As such, there is some question as to whether they can be contracted away or transferred.

As a result, some businesses that regularly depend on freedom to use those works that they have hired others to create, such as magazine publishers, are concerned that adherence could affect not only their commercial practices but their ability to insure that the product truly reflects their viewpoint.

Having made a career in business, Mr. Chairman, I can assure you that I am indeed sensitive to these concerns. Executives can not ignore a perceived threat to established business practices that go to the heart of their enterprises. That is not "selfishness" in the usual sense.

However, I understand that many copyright scholars have concluded that the Administration's proposal in no way jeopardizes these interests. No U.S. copyright owner will derive any additional moral right over their works by virtue of adherence to the Berne Convention. They will get only what our own common law or statutes give them. And because those scholars have concluded that such laws already give authors and artists the same protection that Berne calls "moral" rights, the legislation gives them no additional ones. Indeed, it makes it clear that no "intent" to give additional rights is to be "read into" it either.

In other words, Mr. Chairman, I can appreciate their concern but the Administration's proposal accommodates that concern. We simply cannot allow their nervousness, without more, to deny the rest of the nation the economic, diplomatic and practical advantages that will accrue to the United States through adherence to the Berne Convention.

Some have questioned the relevance of Berne and the World

Intellectual Property Organization in meeting the copyright issues raised by the onslaught of new technologies.

Audiovisual and telecommunications technology is constantly improving, giving consumers new forms of entertainment, more choice, and sharper sound or clearer visual images. It is giving people the ability to enjoy copyrighted works in ways that were unimaginable only a few years ago - and, more importantly, to enjoy these works without necessarily paying for the privilege.

Each new development seems to bring a new challenge to our thinking about copyright concepts. WIPO, as the secretariat for the Berne Union, is the forum in which these new challenges will be debated and new concepts will be formulated. In that forum, both developed and developing countries have a voice.

As such, WIPO is subject to many of the same conflicting pressures from creators and users that Congress deals with regularly and it is essential that the United States be in a position to ensure that its interests are fully represented. Indeed, for the United States, which has the most to gain or lose from Berne's actions, to abdicate any role in it and then complain, as some have done, that it has not always adopted a U.S.-favored position reminds me of the man who, having killed his parents, asked for mercy on the ground that he was an orphan.

Some argue that we really do not need to adhere because so-called "back door publication" permits U.S. publishers - at least the larger ones who can afford to do so - to obtain all the benefits of Berne by publishing in a Berne country. As a practical matter, this practice has caused considerable resentment, for it means that U.S. firms get a "free ride" without our assuming any of the obligations of a member of the Berne Union.

But perhaps the best answer to those who question Berne adherence is that it is simply the right thing to do. It is the proper response for a great nation. It will strengthen our credibility in bilateral and multilateral negotiations. And, as a former Register of Copyrights testified at a House hearing two weeks ago, it will let us "hold our heads higher" in the world of international copyright. Continuing to sneak through the back door while urging others to adopt Berne levels of protection simply isn't good enough. We need, and the rest of the international copyright community wants, an immediate and strong U.S. presence in the Berne Union.

I am aware that some do not believe the claim that Berne adherence neither requires nor will result in changes to U.S. law regarding moral rights. They believe that once we are "in" there will be irresistible pressures to change levels of moral rights protection. They note that while countries such as the United Kingdom adhere based on common law principles, even the UK is considering legislation on the subject.

Well, Mr. Chairman, the UK has adhered to Berne for one hundred years without specific moral rights legislation. Now, I can't promise that the U.S. Government won't change its mind a century from now - all I can say about that is that we won't be the ones debating the issue. What I want to make clear is that it is not the practice of the Administration to break faith with our nation's businessmen and women. I would not come here on a Thursday claiming we do not need to change our laws while planning to seek a moral rights bill on Friday.

Thank you, Mr. Chairman. That completes my statement and I will be pleased to answer any questions you may have.

STATEMENT OF

DONALD J. QUIGG
ASSISTANT SECRETARY AND COMMISSIONER OF PATENTS AND TRADEMARKS

Mr. Chairman and Members of the Subcommittee:

I am pleased to offer my comments on the great importance of United States adherence to the Berne Convention for the Protection of Literary and Artistic Works. The Administration believes that prompt adherence is essential to secure and maintain a strong and credible U.S. presence in the fast-growing global information economy. There are compelling reasons for us to join:

- U.S. adherence to Berne secures the highest available level of international protection for U.S. authors and copyright holders;
- U.S. credibility in our negotiations to improve the protection of intellectual property worldwide is seriously damaged by our failure to adhere to the premier international copyright convention; and
- U.S. adherence will ensure effective U.S. participation in the formulation and management of international copyright policy.

There is absolutely no reason for us not to join Berne - no reason, as least, that takes into account the long-term interests of the United States, our creative community, and U.S. copyright holders. Berne adherence requires only minimal changes in U.S. law, it will not alter the fundamental principles upon which our copyright law is based, and it will not disturb the careful balance of public and private interests achieved in the 1976 copyright revision.

The most important reason to join Berne is that it will assure internationally the highest available level of protection for U.S. authors and copyright holders. The Berne Union has 76 members, including virtually all of the free-market countries, a number of developing nations, and several Eastern Bloc nations.

The United States, the Soviet Union, and the Peoples Republic of China are conspicuous by their absence from this list. However, I have heard that a new Berne-compatible copyright law is under consideration in the USSR and China has indicated interest in adhering to Berne after passage of its new copyright law.

The United States and the Soviet Union, along with another 76 nations, belong to the more-recent, lower-level, Universal Copyright Convention (UCC). China, because it presently has no copyright law, belongs to neither copyright convention. Both Berne and the UCC are administered by United Nations agencies, Berne by the World Intellectual Property Organization (WIPO) and the UCC by the United Nations Educational, Scientific and Cultural Organization (UNESCO). Fifty-four nations adhere to both, and the United States has copyright relations, either through the UCC or bilaterally, with almost 100 countries.

Opponents of Berne adherence have argued that the benefits of adhering to Berne are speculative and remote. If this were true, why would U.S. publishers undertake the substantial expense (one firm's estimate is $10 million per year) to obtain rights under Berne through simultaneous publication in a Berne country?

One of the benefits of Berne adherence is that it assures a higher level of protection than the UCC. Also, there are definite advantages to a nultilateral approach rather than a bilateral approach. First, adherence to berne will give us copyright relations with 24 countries with which we have no current relations. Second, bilateral arrangements suffer from lack of certainty or varying standards and are more likely not to be honored.

Protection under the UCC and Berne is based on the general concept of "national treatment," that requires each member-nation to accord to nationals of other member-nations the same level of copyright protection provided to its own citizens. The national treatment obligation under the UCC is general, and its minimum levels of protection are not sufficient to deter piracy of U.S. works. While the Berne Convention is also grounded in the concept of national treatment, it has the additional requirement that generally well-specified minimum rights be guaranteed under the laws of member nations. Among these are: duration of copyright for life of the author plus fifty years, and rights of translation, reproduction, public performance, broadcasting, adaptation and arrangement. Thus, Berne assures the highest level of protection in the major countries that are the largest users of U.S. copyrighted works.

Protection of U.S. copyrighted works under bilateral agreements, moreover, is often a problem. The standards in these agreements vary widely, they lack the credibility and authority of an international convention like Berne and, sometimes, as in the case of present U.S. bilateral relations with Thailand, they simply are ignored.

An additional reason that Berne adherence will secure high-level protection for U.S. copyright holders is that it would eliminate the need to rely on the previously mentioned "back-door" to Berne. Article 3(1) of the Berne Convention extends protection to the works of authors of non-Berne countries, like the United States, if the works of authors of non-Berne countries, like the United States, are published simultaneously in the country of origin and in a Berne country. Customarily, our copyright owners obtain Berne protection through simultaneous publication of their works in the United States and in the nearest Berne country market, Canada. It has been argued by some that we need not adhere to Berne because American copyright interest can always get Berne-level protection through national treatment in those countries that adhere to both the UCC and Berne, and through the "back door" of simultaneous publication in those countries that belong only to Berne.

This argument ignores several key facts. First, only large U.S. copyright interests can afford the substantial expenses of a program of regular simultaneous publication in a Berne country. Article 3(3) of the Berne Convention defines publication as making a sufficient number of copies of the work available to the public in the country where it is published. As mentioned, this is difficult or impossible for many U.S. publishers and for most individual authors, artists, and composers. For them, Berne protection through the "back door" is not economically feasible.

Second, while the 1948 Brussels version of the Convention defined simultaneous publication as publication in two or more countries within 30 days, some Berne countries, like Canada, have not adhered to the Brussels text and, consequently, require publication within a shsorter period of time. Proving simultaneous publication in a foreign country can be expensive, burdensome, and fraught with uncertainty. A recent example is the Cineads case in Thailand, a Berne member nation, where considerable expense was incurred by the American plaintiff in proving simultaneous publication to the satisfaction of the Thai court.

Another reason that U.S. copyright holders may not always rely on the "back door" to Berne protection, and perhaps the most important reason from the standpoint of maintaining effective international copyright relations, is that the Berne Convention allows its members to retaliate against the works of non-member states. Plainly put, the risk of retaliation against U.S. works will increase if the United States rejects Berne adherence while enjoying a free ride through the "back door."

The capacity of Berne members to retaliate over copyright-related matters is not remote. For example, it is illegal to import books into Canada within 14 days of their first publication in another country. This provision was enacted to stop American publishers from using Canada as a source for "back door" Berne protection through simultaneous publication. Even though this provision has never been enforced by Canadian customs authorities, Article 6(1) of the Berne Convention, added in response to the 1909 U.S. manufacturing clause, sanctions such a provision in the law of a member country seeking to retaliate against the copyrighted works of a non-member country.

Another major reason that the United States should join Berne is that adherence is necessary to ensure effective U.S. participation in the formulation and management of international copyright policy. It is argued that the United States already enjoys a premier role in international copyright affairs, that management of the Berne Convention by its WIPO secretariat is divided among caucuses for developing, developed and socialist countries; and that the proposed inclusion of intellectual property in the agenda of the General Agreement on Tariffs and Trade (GATT) raises a far more likely prospect for achieving higher levels of international copyright protection than would membership in Berne. These claims are short-sighted and disingenuous.

While it is true that the United States is the largest exporter of copyrighted works and may be characterized on that basis as a "leader" in international copyright, it by no means follows that the existence of large markets for U.S. works is the same as a strong role in setting effective standards to help fight against international copyright piracy.

The Copyright Office and members of Congressional committees have recognized the importance to U.S. copyright holders of decisions taken by the General Assembly of the Berne Union. They attend WIPO copyright meetings where they have a limited role because international copyright meetings are jointly sponsored by WIPO and UNESCO. They also have attended Berne revision conferences, but as mere passive observers with no direct voice and only indirect influence on the deliberations. U.S. adherence to Berne would give our officials the right to participate fully in the administration and management of the Convention. In this regard, I must emphasize that revision of Berne requires a unanimous vote. If we join Berne, we can block any decision detrimental to our interests. This is of crucial importance because of our withdrawal from UNESCO.

When the United States withdrew from UNESCO in 1984, it gave up its vote in the UNESCO General Assembly where planning and budgeting decisions are made. Moreover, new technologies for the transmission and use of copyrighted works have "internationalized" intellectual property to an unprecedented extent, and U.S. participation in an effective international copyright organization is essential. We need to have an immediate and strong presence in the Berne Union. Even if we were to rejoin UNESCO, it lacks the breadth of expertise and resources that characterizes the copyright staff of WIPO. Also, the extreme politicization of UNESCO is widely-known.

Membership in Berne also will serve to strengthen the credibility of the U.S. position in trade negotiations with countries that are havens for piracy. Thailand, a Berne member, is a good example. Thai officials repeatedly point out the inconsistency of U.S. insistence on efforts by the Thai government to combat piracy, when we do not belong to Berne. They point out an inherent double hypocrisy: we have so far failed to join Berne, but we take advantage of its benefits through national treatment and the "back door." At the same time we urge other nations to conform to Berne standards. United States adherence can only heighten our credibility and raise the likelihood that other nations will enter the Convention or increase existing levels of copyright protection.

The argument that the proposed inclusion of intellectual property within the GATT obviates the need for U.S. adherence to Berne cannot be taken seriously. Developing a GATT code on intellectual property, which includes an effective dispute resolution mechanism, may be a difficult and lengthy process. Also, when such a code is developed, it will be difficult to enlist the wide membership necessary to make any real difference in the level of copyright piracy.

There is another reason that the argument that a GATT based intellectual property code would substitute for U.S. adherence to Berne is short-sighted. An intellectual property code including copyright within the GATT must be drawn from the copyright standards established in the Berne Convention and adequate and effective national copyright laws. As the world's largest exporter of copyrighted works, the U.S. has a stake in preserving Berne's high levels of copyright protection. The United States position for implementation of high level standards within GATT is seriously weakened unless it adheres to the Berne Convention.

Moreover, it is quite possible that failure of the United States to adhere to the Berne Convention will cause difficulties within GATT, prompting debates as to the types and levels of protection to be provided, possibly jeopardizing the successfulness of the entire intellectual property initiative. Make no mistake about our position. Berne adherence is not a substitute for a GATT intellectual property code, but neither is a GATT intellectual property code a substitute for Berne adherence.

United States adherence to the Berne Convention will require minimal changes in U.S. law to implement the Convention. The expiration of the manufacturing clause removed one of the few remaining obstacles to compatibility between our law and Berne, and only a few changes are necessary to bring U.S. law into conformity with the Convention.

There are compelling reasons for the United States to join Berne -- as noted, our trade negotiators must whitewash the uncomfortable fact that we have taken advantage of Berne's benefits while refusing to join because of our unwillingness to make the necessary changes in our domestic law. The time has come to adhere to Berne: our copyright law requires only a few changes to meet Berne standards and we should not stand by and watch as our credibility erodes around the world.

In recent years, there has been renewed interest and support for Berne adherence among the private sector. Coalition groups in favor of Berne have been formed and they are conducting educational and lobbying activities to create broad-based agreement that immediate U.S. adherence is in the national interest. Parallel to this renewed interest in Berne adherence in the private sector, there has been a recent upswing in legislative activity on international copyright issues related to implementation of the Convention. During the 99th Congress, the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary conducted extensive hearings on the Berne Convention, during which a consensus emerged among authors, publishers, consumers, and Government agencies in favor of U.S. adherence to Berne. A consensus also emerged regarding some, but not all, of the necessary changes in U.S. law to implement Berne. Last October, in the 99th Congress, Senator Mathias, the former chairman of that Subcommittee, introduced a Berne implementation bill, S. 2904. However, Congress adjourned before action on the bill was taken.

Four such bills have been introduced in this Congress. On March 16, Congressman Kastenmeier and Congressman Moorhead introduced H.R. 1623; on May 29, Senator Leahy introduced S. 1301; on July 15, Congressman Moorhead and Congressman Fish introduced H.R. 2962, the Administration's bill to implement the Berne Convention; and on December 18, Senators Hatch and Thurmond introduced S. 1971, the Senate counterpart of the Administration's bill. All of the bills reflect generally similar approaches to bringing our copyright law into compliance with Berne, balancing Berne compatibility and the harmonization of public and private interests achieved in the 1976 Act.

It is agreed by virtually all copyright experts that the Berne Convention does not permit formalities, such as mandatory copyright notice and registration, as preconditions to the existence, scope of rights, and duration of copyright protection. The Convention does permit, however, formalities of a procedural or judicial nature, which are not preconditions for the existence of copyright. Clearly, use of a mandatory copyright notice is incompatible with Berne, and the Administration bill would eliminate it by making use of a copyright notice entirely voluntary. This approach mirrors that of H.R. 1623 and S.1301.

By retaining voluntary notice, all these bills acknowledge that for nearly 200 years U.S. copyright users have relied on the content of the copyright notice to distinguish protected from unprotected works, and that notice remains useful under the UCC. Notice also is one of the easiest deterrents to infringement available to copyright holders.

Under Berne, registration as a precondition to copyright protection is forbidden. Under current U.S. law, registration is not a condition for the existence of copyright. It is, however, a way to cure publication of a work without notice of copyright, without which the copyright lapses at the end of 5 years. It is also a precondition to the filing of a copyright infringement suit. The Administration bill would remove the former provision, as use of the copyright notice would become voluntary, and would retain the latter provision. In my view, this severs the last link between the registration system and the existence of copyright in a work, making U.S. law compatible with Berne as regard to formalities.

The Administration shares the view of many experts that registration as a prerequisite to suit, but not as a precondition to the existence of copyright, is permissible under the Berne Convention. This is because registration as a prerequisite to suit is a procedural rather than a substantive formality. The laws of several Berne member nations, such as Argentina, Canada, and India, have procedural filing requirements necessary to secure copyright protection. In the United States the registration system serves valuable functions, including the creation of a public record of claims to copyright, a reduction in litigation over copyrightability, and perhaps more important, a means for the acquisition of the Nation's creative output by the Library of Congress. The existence of a deposit requirement to maintain the integrity of the collection of a national library, but not affecting the existence of copyright, is a common feature of the law in such Berne countries as France, the United Kingdom, and Mexico.

We recognize that S.1301 would eliminate the requirement of registration as a prerequisite to suit. While such a change might be desirable, we believe that it is not necesssary for Berne adherence. In the interest of making only those changes necessary to bring our law up to Berne standards, and because registration as a precondition to suit serves the important purposes described, we propose to leave the requirement intact. Should a proposal acceptable to the Copyright Office as well as authors and copyright owners be formulated for a new set of incentives to permit a completely voluntary registration system by removal of this judicial formality, the Administration could consider supporting such a change.

Moving from the question of formalities, I would like to direct my remarks to two areas in which U.S. law must be changed to meet Berne standards: the compulsory license for the public performance of musical works on jukeboxes, and the protection of architectural works under copyright.

Experts agree that existing jukebox compulsory license is not compatible with Berne and, all the bills, though differing in detail, provide for the negotiation of voluntary license agreements between performing rights societies, like the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and jukebox operators. The Administration bill retains the existing compulsory license as an option if these negotiations fail. The backup compulsory license provision is consistent with Berne members' practices of using governmental bodies to arbitrate between collecting societies and users of copyrighted works. If the parties cannot reach an accord, the compulsory jukebox license will ensure survival of the jukebox industry by guarding against possible monopolistic practices of either the performing rights societies or the jukebox operators

It generally is agreed that the Berne Convention requires a higher level of protection for architectural works than that provided under existing U.S. law, and the Administration bill would raise the standards for protection without compromising practices in the real estate and construction industries, as some claim that Berne adherence would do. The bill provides that protection does not extend to the process of method of construction. The bill also limits the remedies available for infringement by excluding injunctive relief against an infringing building or structure if construction has substantially begun, and by providing that a court may not order the impoundment, seizure, or destruction of an infringing building.

On the issue of retroactivity, the Administration bill states that adherence to the Berne Convention will not confer copyright protection on any work that is in the public domain in the United States. This approach is identical to that in all the bills. There generally is agreement among experts that Berne leaves considerable discretion to member-nations in determining the degree of retroactive protection to be provided.

The concern has been voiced that failure to grant retroactive protection to foreign works will impede U.S. efforts to obtain retroactive protection, through bilateral negotiations, from nations that currently give little or no protection to U.S. works. While this concern may have some merit, it is clearly secondary to the main objective of obtaining adequate prospective protection in those countries. Moreover, the inability of the United States to provide retroactive protection at home has not prevented U.S. negotiators from securing retroactive protection in other countries, such as Singapore, on a bilateral basis.

I have saved for last, the subject that has raised the most vocal, and in the Administration's view, the most ill-conceived, opposition to U.S. adherence to the Berne Convention -- that of moral rights. Article 6bis of the Convention, requires that the legislation of member-nations protect the so-called "right of paternity" -- the right to claim authorship of one's works -- and the "right of integrity" -- the right to object to distortion, multilation, or modification of the work that would prejudice the author's honor or reputation.

It has been argued that inclusion of a moral rights provision in the U.S. copyright law would create uncertainty and unpredictability in the motion picture, magazine, and book-publishing industries, that depend upon assembling a number of creative works into an interdependent whole. This argument assumes that changes in U.S. law are needed to conform with Berne's moral rights obligations, an assumption with which I do not agree. The Administration's bill reflects the view taken by many copyright experts that the totality of current U.S. law, including Federal statutes, certain common law tort and contract rights, and some state statutes, provides sufficient protection for the rights of paternity and integrity to comply with the Convention.

The U.S. copyright law grants to authors the exclusive right to prepare or to authorize others to prepare derivative works, which can protect against unauthorized distortion, mutilation, or modification. Another Federal statute, section 43(a) of the Trademark Act of 1946, prohibits false designation of origin in intellectual and artistic works. State jurisprudence on the common law of contract, defamation and invasion of privacy, safeguards individual authors from damage to their honor and reputation arising from distortion, mutilation, or modification of their works. Dr. Arpad Bogsch, the Director General of WIPO, has concluded that "legislation" as used in Berne's Article 6bis includes a member nation's decisional as well as statutory law.

Thus, the Administration bill does not include a provision for the protection of moral rights under the copyright law. Indeed, section 2(a)(4) of the bill states unequivocally that the U.S. copyright statute does not include all elements of moral rights protection.

It also has been claimed that, because of doubts as to whether the Berne Convention is self-executing, U.S. adherence would mark the first step towards unchecked extension of moral rights protection through expansive judicial interpretation of the treaty, irrespective of whether a moral rights provision appears in implementing legislation. This would not be possible under any of the proposed bills. All three bills expressly state that the Convention is not self-executing and that U.S. obligations may be met only by appropriate domestic law.

Mr. Chairman, we in the Department of Commerce look forward to working with your Subcommittee on fashioning a consolidated legislative package that will fulfill the wish expressed by Numa Droz, the Chairman of the Diplomatic Conference at which the Berne Convention was adopted 101 years ago. He hoped that "when the pending questions concerning the rights of authors shall have been settled by the Congress, the United States will be able to join the contracting countries, and that they will occupy the place which rightfully belongs to a country that is distinguished by so active and enlightened intellectual activity." The time is now ripe to act upon this offer.

This concludes my prepared statement. I will happily respond to any questions you or your colleagues on the Subcommittee may have.

Senator DECONCINI. Mr. Chairman, thank you for that statement.

We'll now go to Ambassador Yeutter.

STATEMENT OF HON. CLAYTON YEUTTER, UNITED STATES TRADE REPRESENTATIVE

Ambassador YEUTTER. Thank you, Mr. Chairman. It's good to be here to provide a trade negotiating perspective on this issue.

First of all, the United States should have joined the Berne Convention years ago. We didn't do so because we couldn't qualify due to the manufacturing clause being a part of American law. The Congress had the wisdom and good judgment to let that particular provision of law expire a year or so ago, and, therefore, that is no longer an issue and we now do qualify and we should take advantage of the opportunity to join.

The downside on this issue, Mr. Chairman, in my judgment, is essentially nil. There are arguments being made, as Secretary Verity indicated, on the so-called moral rights issue, but I must say, Mr. Chairman, I'm getting a bit impatient with those who have been raising that issue in recent months because, first of all, the legal view within the administration is that it is a non-issue. But, second, for those who do have concerns, it seems to me that they have an obligation to enunciate very clearly why those concerns are relevant and what they expect to do about them. Otherwise, they ought to back away from that issue because those same firms have more at stake in our joining the Berne Convention than probably anybody else. So, in essence, they've really been shooting themselves in the foot.

Somehow they have been able to work through this issue with a lot of other countries in the world, and one would think that they could do so here in the United States as well. The fact is, Mr. Chairman, there are only about three major trading nations who are not now members of the Berne Convention: the United States, the Union of Soviet Soialist Republics, and the People's Republic of China. The latter two are beginning to make moves in the direction of doing what is necessary to join, so we may find ourselves in the not too distant future as the only major nation of the world that is not a member of Berne. I happen to think that would be an enormous embarrassment for our country, and we ought to have the good judgment to avoid that kind of situation.

This is a major negotiating priority for the administration, Mr. Chairman, around the world. We've got billions of dollars at stake. It's an issue that has arisen in the last decade or so as one of our major impediments to American exports. We're losing billions of dollars in exports as a result of the piracy of our intellectual property, and we need to fix this. We're the big loser, and one way to help fix it is through the Berne Convention, which provides some standards in the copyright area.

One reason this is particularly important is because software standards are an increasingly important issue. We're a high technology country. We're out ahead in computer-related industries.

Right now, Mr. Chairman, we're freeloading on the Berne Convention through the mechanisms that provide backdoor protection, but that's not the kind of image the United States ought to have. We ought to be better than just simply freeload off what the rest of the world is doing.

Furthermore, we're a bit hypocritical in this area because we—and "we" is primarily my operation at the Office of the U.S. Trade Representative—are asking other countries to do more in this arena than we're prepared to do ourselves. It's a bit difficult for us to march around the world asking people to improve their protection in intellectual property, particularly protection in the copyright area, when we're unwilling even to join the Berne Convention.

One argument we hear on this, Mr. Chairman, is that we will have no chance of changing things in the Berne Convention once we join it because it's LDC dominated, and it just deals with standards; it doesn't do anything in the enforcement area; therefore, we're just whistling in the wind when we argue there's any value in joining the Berne Convention. In my judgment, Mr. Chairman, that's an absolute copout.

That's a little bit like the football player standing on the sidelines complaining his team is getting beaten and when the coach wants to put him in the game, he refuses to play. It seems to me that we ought to be willing to play. We can't play if we're not a member of the Berne Convention. We ought to try. If we can't improve the copyright standards through the Berne Convention, so be it; then we look for another mechanism for doing so. But let's not just sit on the sidelines and whine, which is essentially what we're doing today.

Finally, this is important to us in the context of the Uruguay round of GATT negotiations. Intellectual property is on the agenda at our behest. It's one of our principal negotiating priorities in the Uruguay round, and we lose considerable leverage in that negotiation by not being a member of the Berne Convention. We're going into Geneva saying that we want an improvement in standards in intellectual property and the copyright and patent area, and we want some enforcement of those standards and implementation worldwide.

The answers that other countries give is: how can you talk to us about standards when you won't even join the Berne Convention? The fact of the matter is they're right; we cannot make legitimate arguments about improvement of standards if we're not prepared to join the Berne Convention and then try to achieve those improvements.

We need to do this systematically and step by step, and the first step should be to join the Berne Convention. The second step is to try to raise standards still higher within the Berne Convention. The third step is go into the GATT round then and say we're doing our job in the Berne Convention; let's do even better in the Uruguay round—in standards, if need be, and then in the implementation of those standards.

Thank you, Mr. Chairman.

[Submissions for the record follow:]

STATEMENT OF AMBASSADOR CLAYTON YEUTTER
UNITED STATES TRADE REPRESENTATIVE

BEFORE THE SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

February 18, 1988

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I appreciate this opportunity to appear before this Subcommittee to express the Administration's strong support for United States adherence to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). Currently, four bills are pending before Congress that provide for implementation of the Berne Convention. These are H.R. 1623, S. 1301, and H.R. 2962, and S. 1971.

I will leave for my colleagues the task of addressing the technical aspects of these bills. I would like to concentrate on the importance of U.S. adherence to Berne as a means of advancing the trade interests of U.S. copyright-based industries. Through my remarks I want to make you aware of some of the problems we encounter in trade discussions because the United States does not adhere to the Berne Convention, as well as some of the advantages we would enjoy if we were to join.

Trade in goods and services protected by intellectual property is increasingly important to the United States and world economies. U.S. industries relying upon copyright protection for their creative efforts represent a wide diversity of activities including traditional publishing interests, the motion picture industry, music publishing and recording industries, and computer software producers and distributors. These industries have an important place in the U.S. economy and international trade. In the 1980's, trade in goods and services produced by these industries resulted in annual trade surpluses of over $1.0 billion. Providing strong copyright protection and enforcement of those rights rewards creative activity and provides recognition and incentives for future work. The opposite, inadequate protection, simply fosters piracy. Failure to provide and enforce U.S. owned copyrights will in the future diminish trade in new and creative products.

In recent years, the Administration has engaged in an all out effort to attain the highest levels of protection and enforcement of copyrights, as well as other forms of intellectual property, internationally. Armed with legislation amending Section 301 of the Trade Act of 1974, and the Generalized System of Preferences (GSP) program, we have initiated four investigations of copyright policies and practices in Brazil, Korea, Indonesia and Thailand. In addition, during my tenure at USTR, we have had bilateral discussions concerning copyright issues with more than 15 other countries.

In all of these bilateral negotiations, we have been operating under a handicap because we had to explain and defend U.S. non-adherence to the Berne Convention. The most recent example occurred just two weeks ago. In consultations with the Republic of Korea on copyright matters, the Korean delegation's first question concerned our efforts to join Berne.

Too often we have found that our non-adherence to Berne is the basis for foreign resistance to making changes in their own inadequate laws. Non-adherence to Berne also allows trading partners to view the United States as something of a "second class citizen" in the copyright world, and question our commitment to attaining high levels of copyright protection internationally. And frankly, it brings into question our commitment to high levels of protection in other areas of intellectual property such as patents and trademarks. Achieving meaningful results in negotiations requires leverage. In this area, the leverage comes from setting the right example for the rest of the world, and that requires adherence to the Berne Convention.

Non-membership in Berne has other adverse effects. It forces firms to seek expensive "back door" Berne protection through simultaneous publication in the United States and in countries that adhere to Berne. This "back door" depends on the good will of Berne members to permit the United States to continue the "free ride" on their convention. However, many U.S. copyright owners may lose this protection because they cannot afford it. And even if a U.S. copyright owner can afford to qualify for "back door" Berne protection, its continued availability is uncertain.

The uncertainty results from the ability of Berne members to effectively delay publication and preclude compliance with the requirements for "back door" protection. The definition of simultaneous publication, a requirement for "back door" Berne protection, varies depending upon the Berne text adhered to by a particular Berne member. Canada, geographically the closest Berne member and the traditional place for U.S. authors to achieve "back door" Berne protection, adheres to a text that requires publication in both markets in less than 30 days. Canada also has a law restricting importation of books into Canada within 14 days of their first publication in another country, such as the United States. Although Canada has never enforced this law, the combination of the short time period for qualifying as simultaneous publication and potential enforcement of this measure cast a specter over this traditional route to Berne protection.

Last year, the President initiated an investigation of Thailand's copyright practices under the GSP annual review measures. This investigation was in response to a petition filed by the International Intellectual Property Alliance (IIPA), a trade association whose members represent seven major copyright industries. Thailand is a member of the Berne Convention and provides copyright protection to other members of the Convention and "back door" Berne protection to U.S. works, but does not provide direct protection to U.S. works.

As noted in IIPA's petition, the availability of "back door" Berne protection does not provide adequate means of protecting U.S. works in Thailand. In addition to the risk of losing this protection through enforcement of laws like the Canadian import ban, U.S. copyright owners must run the gauntlet of proving simultaneous publication. U.S. membership in Berne would eliminate the problem of obtaining basic copyright protection in Thailand. We would receive the same high level Berne protection that other Berne members now enjoy in that country.

The situation in Thailand is only one example of the problems caused by our failure to adhere to the Berne Convention. Recently, U.S. negotiators have been able to resolve copyright problems with a number of countries such as the Republic of Korea and Singapore. We are also working with Malaysia and Indonesia to achieve the same positive results, and we are making significant progress.

In the bilateral negotiations with Singapore and Korea, we were repeatedly asked the difficult question of why the United States was pushing so hard for strong copyright protection in these countries when we did not adhere to the Berne Convention.

U.S. membership in the lower level Universal Copyright Convention (U.C.C.) is a significant factor when governments consider what level of protection to provide U.S. works and whether to adhere to an international copyright convention. The Republic of Korea, for example, joined the U.C.C. rather than the Berne Convention. It is difficult for our negotiators to insist on Berne level protection when the United States has not joined that convention.

I believe that it is important for countries such as Singapore and Korea to adhere to Berne rather than the U.C.C. Although both conventions are based on the concept of national treatment, i.e., U.S. works must receive the same protection as works created in a member country, the Berne Convention contains additional minimum rights that must be guaranteed under the laws of member nations. Berne, in effect, provides some of the parameters for national treatment. By this means, Berne ensures that U.S. copyrighted works receive the highest level of protection in other countries.

There are 24 countries that are signatories of the Berne Convention, but are not members of the U.C.C. At least two of these countries, Turkey and Egypt, are significant markets for U.S. copyrighted products and services. We are now planning bilateral copyright discussions with both Egypt and Turkey to establish direct protection for U.S. works. These discussions would have a much better chance of succeeding if we were to join Berne.

The Peoples Republic of China (PRC) is considering joining the Berne Convention rather than the U.C.C. It is indeed ironic that a country such as the PRC could go from having no tradition of copyright protection to being able to adhere to the highest level of international obligations, while the United States, the world's major beneficiary and proponent of strong copyright protection, has not taken the same step.

In 1986, we were successful in putting intellectual property rights protection on the agenda for the Uruguay Round negotiations in the GATT. This accomplishment is significant because it recognizes the relationship between trade and adequate and effective protection of copyrights and other forms of intellectual property rights. Moreover, I believe that the multilateral and bilateral effort are complementary. A multilateral consensus on strong protection for intellectual property rights will enhance our bilateral efforts to improve protection and enforcement of those rights. During the multilateral negotiations, we anticipate that an important issue raised by our developed country trading partners will be U.S. adherence to Berne.

Some opponents of joining the Berne Convention argue that all of our copyright problems can be resolved in the Uruguay Round negotiations on intellectual property rights without requiring the United States to face complex issues such as moral rights requirements. I agree that these negotiations can provide something that is clearly missing from the Berne Convention. A GATT agreement can provide a trade-based mechanism for the international enforcement of intellectual property obligations. This is important and represents a major U.S. objective for these negotiations. I doubt, however, that our trading partners will be willing to negotiate an agreement in the GATT that would enforce lower standards of protection than already exist in their national laws. I know that the Administration is adamantly opposed to diminishing protection of intellectual property rights or allowing participants to use the Uruguay Round negotiations on intellectual property rights to weaken standards as they currently exist in international conventions.

Assuming that we are successful in achieving our objective of enforcing strong copyright protection through any GATT agreement, it is unlikely that all 76 signatories of the Berne Convention will immediately sign a GATT agreement. I would like to be surprised on that matter, but I do not think it is probable. Thus, Berne adherence will ensure that we have copyright protection in all Berne signatory countries.

Congressional action on the Berne Convention will affect our bilateral and multilateral negotiations on intellectual property rights. The United States is the world's major proponent of improved protection and enforcement of intellectual property rights. If we expect the rest of the world to negotiate seriously on this issue and respect our commitment to strong protection of intellectual property rights internationally, we must be willing to take steps similar to those that we ask of our trading partners.

The United States provides strong protection for creative activity under its copyright laws. It is important that we remove the impression that the United States is unwilling to observe the highest international obligations for copyright protection.

SENATOR LEAHY'S

QUESTIONS FOR AMBASSADOR YEUTTER

You and your staff maintain a very heavy schedule of bilateral negotiations to try to persuade other countries to remove barriers to trade in U.S. goods. It strikes me that, in the copyright field, inadequate copyright protection and toleration of piracy are very real barriers to trade in copyrighted goods, which is so important to our overall trade posture. Do you agree?

How will U.S. adherence to Berne assist the Office of the U.S. Trade Representative in these bilateral negotiations?

Will the beneficial effects be limited to copyright negotiations, or do you think that U.S. adherence to Berne might have a positive "spill-over" effect in negotiations to lower other trade barriers in the intellectual property field (e.g., inadequate patent protection, toleration of trademark counterfeiting)?

Your office is embarking on an important initiative to incorporate within the GATT trading rules stronger protections for copyright and other forms of intellectual property. How do you gauge the chances for a successful outcome in two sets of circumstances: first if the U.S. joins Berne; second, if the U.S. remains outside the Berne Convention?

THE UNITED STATES TRADE REPRESENTATIVE
Executive Office of the President
Washington, D.C. 20506

RESPONSE TO SENATE JUDICIARY SUBCOMMITTEE STAFF QUESTIONS ON ADHERENCE TO THE BERNE CONVENTION

Inadequate copyright protection and lack of enforcement of existing laws distort trade and can constitute barriers to trade in copyrighted goods. The United States has a significant interest in remedying these problems and encouraging trade in copyrighted goods. The recent study issued by the U.S. International Trade Commission on Foreign Protection of Intellectual Property Rights and The Effect on U.S. Industry and Trade contains reports from U.S. firms regarding serious problems in the protection and enforcement of intellectual property abroad. Industries that rely on copyright protection including the entertainment, computer and software, and printing and publishing estimated losses of over $6.3 billion in 1986 resulting from inadequate and ineffective protection of intellectual property rights.

Adherence to the Berne Convention will assist in bilateral negotiations to improve protection of U.S. works in a number of ways. First, adherence to Berne will result in copyright relations with a number of countries such as Thailand, Egypt and Turkey that adhere to Berne but not to the Universal Copyright Convention. Second, during bilateral negotiations, the United States encourages its trading partners to adhere to an international convention. It is difficult for the United States to insist that countries such as the Republic of Korea join Berne or provide the higher levels of protection in that Convention when the U.S. does not adhere to the Berne Convention. Finally, other countries use U.S. non-adherence to Berne as an excuse for deficiencies in their laws. While the United States asks other countries to take "politically difficult" steps to improve the protection of intellectual property, we are unwilling or unable to take the step of adhering to the Berne Convention.

I believe that the beneficial effects of adhering to the Berne Convention will extend to U.S. efforts to improve protection of all forms of intellectual property. Adherence to Berne will reaffirm U.S. commitment to obtaining improved protection of intellectual property and demonstrate our willingness to amend U.S. law to conform to internationally accepted norms.

I believe that we will have a successful outcome of our Uruguay Round negotiations on intellectual property even in the absence of U.S. adherence to the Berne Convention. The content of a GATT Agreement on intellectual property, however, is yet to be determined. U.S. adherence to Berne could have an effect on the substance of copyright provisions in a GATT Agreement on intellectual property. Participants in the GATT negotiations have repeatedly pointed out that the United States does not adhere to Berne and urged us to take that action.

Senator **DeConcini**. Mr. Ambassador, thank you very much. We appreciate that very explicit example of what we ought to do. I think it sets the record very clear.

We'll now hear from Allen Wallis, the Under Secretary for Economic Affairs.

Mr. Wallis, your full statement will be entered in the record. You may summarize.

STATEMENT OF HON. ALLEN WALLIS, UNDER SECRETARY FOR ECONOMIC AFFAIRS, U.S. DEPARTMENT OF STATE

Mr. **Wallis**. Thank you, Senator.

I have something of a dilemma. Congressman Kastenmeier gave an excellent and comprehensive statement to which there is not much to add, and what could be added Secretary Verity and Ambassador Yeutter have added. On the other hand, we attach a great deal of importance to this issue in the State Department and would be reluctant to sit silent on the grounds that somebody else had already made the case effectively.

There are two important developments in the eighties that have focused attention on international copyright protection. First, there's been a great increase in copyright piracy worldwide. U.S. copyright interests consider that adherence to the Berne Convention is one means of alleviating copyright piracy, which is very costly, as was indicated.

Second, protection of intellectual property has emerged as an issue in foreign trade, as Ambassador Yeutter pointed out. In the new trade round known as the Uruguay round, the United States is seeking a GATT agreement on intellectual property which would be acceptable to developing as well as developed countries. The agreement should be based on the high levels of protection of the Berne Convention.

As a result of these developments, in September 1984 the Department's International Copyright Panel, which is composed of a wide spectrum of private organizations, considered the issue of U.S. adherence to Berne and reached a broad consensus in favor of adherence. After favorable interagency consideration, in June 1986 the President, acting on the recommendation of the Secretary of State, sent the Berne Convention to the Senate and advise and consent to accession.

As important as obtaining Senate approval is, the issue of what kind of implementing legislation will be required to bring U.S. copyright law into conformance with the Convention is equally important. The basic question is whether the Berne Convention is self-executing.

The State Department takes the same position it has taken for decades on that issue; namely, that treaties on intellectual properties should not be self-executing. All of the bills that have been introduced in the Senate and the House concerning the Berne Convention state explicitly that the Convention is not self-executing under the Constitution and laws of the United States. The intent and language of the legislation is so clear that it's inconceivable that any legal action instituted on the grounds that Berne is self-executing could be successful.

Last year certain questions were raised by a segment of publishing industries that depend heavily on copyrights, primarily magazine publishers, as to whether our adherence to Berne is in the overall interest of the United States. The Departments of Commerce and State and the Office of the U.S. Trade Representative studied those questions carefully in connection with a hearing last July 23 that Chairman Kastenmeier's committee held, and the firm position of the administration at that time and still today is that the United States should adhere to the Berne Convention.

The administration's position is based on our belief that the advantages of membership in the Berne Convention far outweigh any possible disadvantages. I'll mention six of the advantages.

First, adherence to the Berne Convention will place the United States in a position to exert greater leadership in international copyright matters commensurate with our position as the world's largest producer of copyrighted materials. Further, our membership in the high-level Berne Convention will give us a role in its administration and management.

Second, with adherence to Berne, the U.S. authors would immediately gain good copyright protection in 24 countries that subscribe to the Berne Convention but do not belong to the Universal Copyright Convention.

Third, membership in the Berne Convention would strengthen U.S. efforts in negotiations in the GATT for an agreement on intellectual property and in negotiations to get developing countries to follow the high standards of Berne.

Fourth, as a member of the Berne Convention, the United States would be a voting participant in the next revision. Under the Berne rule of unanimity, we would be able to veto proposals that were detrimental to the U.S. interest.

Fifth, our adherence to the Berne Convention would advert the risk of possible retaliation against U.S.-copyrighted materials by members of Berne, some of whom resent our free ride, to which Ambassador Yeutter referred, which we gain by publishing simultaneously in a Berne country and the United States.

Sixth, and in the long term probably the most important, is the widespread belief here and abroad that our adherence will strengthen the Convention and make it more effective worldwide.

Mr. Chairman, the Department of State hopes that after so many decades of favoring adherence to the Berne Convention we'll be successful this time. We believe that if we fail, it will be a great loss wherever literary and artistic works are an essential part of the cultural heritage.

Thank you.

[The prepared statement of Mr. Wallis follows:]

STATEMENT OF
ALLEN WALLIS
UNDER SECRETARY FOR ECONOMIC AFFAIRS
BEFORE THE
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

FEBRUARY 18, 1988

The Department of State appreciates having this opportunity to present its views on United States adherence to the Berne Convention for the Protection of Literary and Artistic Works. At a time when this Government is pressing for greater international intellectual property protection on a number of fronts, our adherence to the Berne Convention is a top priority.

BACKGROUND

It is difficult to understand why the nation which produces more books, motion pictures, sound recordings, music, and other artistic works than any other has not yet joined the Berne Convention -- a convention negotiated and signed more than a century ago. In 1886 an observer represented the United States at the Diplomatic Conference in Berne, Switzerland to negotiate the Berne Convention. Today the United States is still represented by an observer at meetings of the various administrative bodies of the Berne Convention.

The United States has not adhered to the Berne Convention largely because of the nature of the copyright law in the United States from the late 19th century to the present. With the enactment of the Chace Act in 1891, foreign works were protected in the United States for the first time. This Act was revised in 1909 and again in the overall revision of the U.S. copyright law in the Copyright Act of 1976. However, a number of obstacles such as the notice formalities and juke box licensing requirements have remained as obstacles to our adherence to the Berne Convention to the present day.

From 1891 to the mid-1950's Berne was the only worldwide convention, so the United States established copyright relations with foreign governments through bilateral agreements.

UNIVERSAL COPYRIGHT CONVENTION

The inability of the United States to adhere to the Berne Convention gave rise to a strong movement in the late 1940's and early 1950's for the negotiation of a multilateral convention that would require minimal changes in U.S. copyright law. The tradeoff for these minimal changes, however, was less effective protection for U.S. works. The culmination of this movement was the negotiation of the Universal Copyright Convention (UCC) at the Intergovernmental Copyright Conference in Geneva, Switzerland in August-September 1952. However, the principal negotiators at this Conference, including those of the United States, regarded the UCC as a "bridge" to the Berne Convention, not as an alternative to it.

The United States joined the UCC in September 1955 and has participated very actively in its work. Adherence to the Berne Convention continued, as in the past, to be a basic foreign policy objective of the United States in the international copyright field. The legislative history of the Copyright Act of 1976 shows clearly that one objective of the monumental revision effort was to eliminate major obstacles to U.S. adherence to Berne. Thus, for example, the term of protection in the 1976 Act was increased to that in the Berne Convention of "life of the author and fifty years after his death."

COPYRIGHT PIRACY

It is worthwhile to look at why, more than a decade after those changes, attention is again focused on international copyright policy. Clearly the most important development is the tremendous increase in the 1980's of copyright piracy. A 1985 study by a private sector group (Intellectual Property Alliance) estimated that copyright piracy in only ten countries cost U.S. industry $1.3 billion in lost sales annually. U.S. copyright interests viewed adherence to the higher level Berne Convention as one means of alleviating costly copyright piracy.

Copyright piracy has stimulated both government and industry to look closely at standards of protection. While the United States and other major trading countries have relatively good copyright laws. This is not the case in many developing countries. We have consulted with several foreign governments whose copyright policies were causing serious economic harm to U.S. copyright interests and pointed out the principal elements of a good copyright law which would provide "adequate and effective" protection for copyrighted works. During this exercise it has become clear that the provisions of Berne are the best standard on which to base that protection.

INTELLECTUAL PROPERTY AS A TRADE ISSUE

An equally important development which has focussed attention on international copyright is the emergence of foreign intellectual property protection as a trade issue. During the past several months the Departments of State and Commerce have been working closely with the United States Trade Representative to develop U.S. proposals for a GATT agreement in the Uruguay Round to protect intellectual property. Consideration of the copyright standards in any proposed agreement inevitably will be based on the high levels of protection in the Berne Convention - standards which have been accepted by many developing as well as developed countries.

Not only is U.S. adherence to Berne justified on its own merits but there is further justification as part of a comprehensive program of related measures to strengthen the global intellectual property system. A GATT agreement incorporating copyright standards based on Berne could be one of these measures.

BERNE MILESTONES

As a consequence of these developments, in September 1984 the Department's International Copyright Panel, composed of major private sector organizations, considered the issue of U.S. adherence to Berne and reached a broad consensus in favor of adherence. In February 1986 the Cabinet Council on Commerce and Trade approved adherence to Berne. Following this favorable action, in June 1986 the President, acting on a recommendation of the Secretary of State, sent the Berne Convention to the Senate for advice and consent.

IS BERNE SELF-EXECUTING?

Equally important with the matter of Senate advice and consent is the issue of what kind of implementing legislation is needed to bring U.S. copyright law into conformance with Berne. In general, our copyright law meets the high level of protection in the Convention. A fundamental question that arises in the context of the implementing legislation is whether the Berne Convention is self-executing. It is a question that is of special interest to the Department of State.

For several decades it has been State Department policy that intellectual property agreements should not be self-executing. Since the second World War, none of the intellectual property treaties to which the United States has adhered has been regarded as self-executing.

The expert private sector "Ad Hoc Working Groups on U.S. adherence to the Berne Convention", set up at the request of the Department of State, concluded unequivocally in its Final Report (Chapter XII) that if the United States acceded to the Berne Convention, it "would not be a self-executing treaty in this country." The Ad Hoc Working Group further stated that if there was any doubt about this matter, "it could be resolved by a Senate statement of intent that Berne is not to be construed as self-executing in the U.S."

On the issue of whether Berne is self-executing, the Department has noted that Congressman Kastenmeier's Bill (H.R. 1623, March 16, 1987), and Senator Leahy's bill (S. 1301, May 29, 1987) both state explicitly that the Berne Convention is not self-executing under the Constitution and laws of the United States.

The Administration Bill, which was drafted by the Commerce

Department's Patent and Trademark Office and introduced by Congressmen Moorhead and Fish in the House (H.R. 2962, July 15, 1987) and by Senator Hatch (S. 1971, December 18, 1987), also declares in Section 2 of the Bill that the Berne Convention is not self-executing. Section 2 also states very clearly that U.S. obligations under Berne can be met only by provisions of domestic law.

With such clear intent as expressed in the various proposed bills to implement our obligations under the Berne Convention, we find it difficult to imagine that a legal action instituted on the grounds that this convention is self-executing would be successful.

PRIVATE SECTOR VIEWS

Last year certain questions were raised by a segment of U.S. copyright industries, primarily magazine publishers, as to whether U.S. adherence to Berne is in the overall interest of U.S. copyright interests. The interested agencies -- the Office of the U.S. Trade Representative and the Departments of Commerce and State -- studied these questions carefully in preparation for a hearing before Chairman Kastenmeier's Subcommittee on Courts, Civil Liberties and the Administration of Justice on July 23, 1987. The firm position of the Administration at that time and today is that the United States should adhere to the Berne Convention, and that adherence is in the best interest of U.S. copyright interests.

As far as private sector views are concerned, we note the strong support for adherence to Berne by the National Committee for the Berne Convention. This Committee is composed of a large number of professional and business associations, together with corporate enterprises, representing a wide range of producer and consumer interests.

ADVANTAGES OF BERNE MEMBERSHIP

To summarize, the Administration's position is based on our belief that the advantages of membership in the Berne

Convention far outweighs any possible disadvantages:

- Adherence to the Berne Convention will put the United States in a position to exert greater leadership in international copyright relations commensurate with our preeminent position as a producer of copyrighted materials. In contrast with our membership in the Universal Copyright Convention (UCC) which provides a lower level of protection. U.S. membership in the high level Berne Convention would give us a role in its administration and management.
- With adherence to Berne U.S. creators would immediately get high-level copyright protection in 24 Berne member States that do not belong to the UCC, including such countries as Egypt and Turkey. This would obviate the need for simultaneous publication in a Berne member State which is a difficult and sometimes expensive procedure.
- Membership in the Berne Convention would strengthen our efforts in negotiations with other governments, especially developing countries, to raise the level of copyright protection in their countries either through a bilateral agreement with the U.S. or by joining one or both of the multilateral conventions. We would be in a more solid position to encourage developing countries to join Berne rather than the UCC and bring their copyright laws into conformance with the higher standards of the Berne Convention.

o Adherence to Berne would aid our efforts to incorporate standards based on the high levels of copyright protection of that convention in the proposed GATT intellectual property agreement.

o U.S. membership in Berne would allow the United States to be a full participant in the next conference to revise this convention, which was last revised in 1971. Because the Berne Convention requires unanimity (Article 27) for adoption of any revision of the convention, the U.S. would be able to veto any revisions that would have an adverse effect on U.S. copyright interests.

o There is a risk of possible retaliation against U.S. copyrighted works by Berne member States who may be resentful about our "free ride" on the Berne Convention through simultaneous publication in the U.S. and a Berne member State such as Canada. Article 6 of the Berne explicitly authorizes retaliation against the works of a non-member State. U.S. adherence to Berne would avoid such a risk.

o A final reason, and in the long-term perhaps the most important, is the widespread belief abroad and in the United States that United States adherence to the Berne Convention will strengthen that convention and enhance its position worldwide. The absence from the Berne Convention of the United States--the world's leading producer of copyrighted materials--has long raised questions as to the true universality of this convention.

STRENGTHENING INTERNATIONAL COPYRIGHT

Unquestionably today we are experiencing a worldwide technological revolution involving computers, communications satellites, super conductors, fiber optics, optical discs, and many other technologies. These innovations strongly affect the dissemination and use of copyrighted works. They are making piracy easier and enforcement more difficult. It is the view of many international copyright experts not only in the United States but also in Western Europe that the Berne Convention is a comprehensive and dynamic instrument which meets the challenges brought on by new technologies.

The United States is going to have to make certain basic decisions which will influence international copyrights well into the 21st century. One of these basic decisions has to do with United States adherence to the Berne Convention. We believe that U.S. adherence to Berne will strengthen the system of international respect for copyright that has been developed during the past century since the negotiation of this Convention in 1886.

After a century of considering membership in the Berne Convention it is time for the United States to accept the responsibilities of such membership. Failure to do so could clearly have adverse effects on the authors and artistic creators of this country.

Department of State
February 18, 1988

Senator DeConcini. Thank you, Mr. Secretary.

Let me just ask you one question. You touched on the self-execution provision, and I thank you for that excellent record.

Are there any other steps that we as part of the legislative body here need to take to insure that the treaty would not be self-executing either now or even after it might be ratified by the full Senate?

Mr. Wallis. I talked to my lawyers in some detail about that. Of course, it is a legal question. Several of you people are lawyers, but let me just summarize what I've been told.

I've been told, first, that whether or not it's self-executing is ultimately a question for the U.S. courts to determine under relevant U.S. legal principles, and I'm assured that there's no doubt whatsoever that U.S. courts will find that Berne is not self-executing, and that determination would be based on a number of considerations: first, the language of the treaty itself and, second, the clear intent of the executive branch, and presumably the Senate if it approves adherence, in enacting the legislation, and on the existing statutory framework for copyright law in the United States, and on case law that has dealt with questions of self-execution in the context of other treaties.

Also, not being a lawyer, I brought my lawyer with me. I'd be happy to have him respond to further questions if you would like to pursue that further.

Senator DeConcini. That's quite satisfactory. Thank you for that explanation.

I want to thank the Secretary and the Ambassador for letting me question Mr. Wallis first due to the fact that he has to chair something for Secretary Shultz.

I wonder if any of my colleagues here want to ask Mr. Wallis a question before we excuse him.

Mr. Wallis. Could I say, just to show that we cooperate within the administration, that Secretary Baker——

Senator DeConcini. Secretary Baker, too.

Senator Hatch. Maybe I could ask just one question. You've alluded to this. Recently a constitutional issue arose in connection with the moral rights question. As the argument goes, the Constitution mentions the existence of exclusive rights for authors "to promote the progress of science and useful arts." Thus, as I understand the argument, the Constitution permits copyright protection only for the benefit of the general public.

If expanse of moral rights of authors were implemented, would this conflict with the Constitution's public benefit theory of copyrights? Do you see any constitutional concerns with the moral rights of Berne?

Mr. Wallis. That and the question of self-execution are the two that we've given the most extensive and critical examination. I suppose on that one also I really need to call on my lawyer, and I can do that if you like.

Senator Hatch. Why don't we have him submit his——

Mr. Wallis. What was that?

Senator Hatch. Why don't we have him submit his opinion with regard to this.

Mr. Wallis. All right, we'll do that.

Senator **Hatch**. Maybe that will solve our problem.

Mr. **Wallis**. We'll send a written opinion in.

Senator **Hatch**. All right.

Mr. **Wallis**. All right, good.

Senator **DeConcini**. Without objection, the opinion will be accepted as part of the record.

[Opinion of Mr. Wallis, subsequently submitted for the record, follows:]

The constitutional provision in Article 1, section 8, gives Congress broad latitude to enact whatever incentives it deems appropriate to promote authorship and the progress of science, as long as these rights are not perpetual. Such rights of authors would seem to include moral as well as economic rights. However, since no one is proposing that the Berne implementating legislation include specific provisions recognizing any moral rights, let alone "expansive moral rights", this seems to be a moot point. As we have determined, present U.S. law provides an author with protection that is equivalent to the minimum moral rights recognized in Article 6*bis* of Berne. If specific moral rights legislation is unconstitutional, the protection currently available would also appear to be unconstitutional. In sum, there is little merit in this constitutional argument.

It is difficult to state with absolute certainty what issues might be raised in a lawsuit. However, we do not expect any litigation on this point, particularly considering that we do not expect, or see the need for, any legislation concerning moral rights.

Senator **Hatch**. Also, I'd like him to just express in that opinion whether or not he would expect this matter to be litigated, the constitutional rights matters to be litigated on this particular point as well as others, and what the likelihood is to be.

Mr. **Wallis**. Yes. Well, that is a matter that concerns a number of people, and I have been buttonholed by a number of authors about that. I've looked into it at more length than I otherwise would have and have been satisfied.

Some of the charges made are kind of alarming.

Senator **Hatch**. I understand. That's why I raise the issue. We'd just like to have the best we can have there.

Thank you, Mr. Chairman.

Senator **DeConcini**. The Senator from Vermont, do you have any questions of Mr. Wallis?

Senator **Leahy**. No, I don't.

Senator **DeConcini**. Thank you, Mr. Wallis.

Mr. **Wallis**. Thank you. I apologize for having to dash off, because I'm very much interested in this subject because of my own professional background.

Senator **DeConcini**. I understand, and I do thank you again, Secretary and Ambassador, for permitting us to go out of order here.

I would like to ask Secretary Verity: Mr. Secretary, can you offer to the committee any specific examples of instances in which the United States has been hampered in its efforts to negotiate trade or other types of agreements because of our nonmembership in Berne?

Secretary **Verity**. Mr. Chairman, I'd have to ask for help from my two colleagues here. I don't know specifically of any such instances.

Senator **DeConcini**. If your office has some, it would be helpful for us to have a record. They can submit them to us.

Secretary **Verity**. We'd be happy to submit that. Evidently, there are several.

Senator **DeConcini**. Thank you.

[The following information was subsequently submitted for the record:]

Our negotiators and intellectual property experts have told me of many instances in which they have been confronted by our non-membership in Berne in the context of efforts to get other countries to improve their copyright laws. For example, during the course of negotiations for the settlement of our self-initiated trade action against the Republic of Korea, we were repeatedly asked why we used Berne as the standard against which copyright laws ought to be measured when we were not a member. During similar negotiations with Brazil on computer software, the Brazilians would not listen to any discussions about Berne since Brazil had been a Berne member since 1922 and we were not. Our non-membership in Berne also has been raised in bilateral discussions with Singapore, Malaysia, Indonesia and Taiwan.

In all of these instances our non-membership in Berne has made the difficult job of convincing these countries to improve their copyright laws harder. Sometimes it spills over into other areas of intellectual property too. It boils down to a matter of credibility. If we are really serious about establishing reasonable and strong protection for U.S. intellectual property around the world, Berne membership is a must.

Senator DECONCINI. Also, Mr. Secretary, what remedies for infringement are available to the Berne member countries against another that are not presently available to the United States or its citizens and companies?

Secretary VERITY. I understand that often we have to do this bilaterally and that those countries that are members of the Berne Convention seem to get better support from local enforcement people than perhaps——

Senator DECONCINI. It's elective on their part, on the part of the local jurisdiction—the courts——

Secretary VERITY. That's right.

Senator DECONCINI. Ambassador Yeutter, information has come to me that some countries are just flagrant in permitting pirating, a couple—not to start any international problem with good allies of ours—but Egypt and Thailand seem to have, unfortunately, developed that reputation internationally. They both belong to Berne.

Do they limit their piracy to works of non-Berne members or do they also pirate the works of nations that are members of Berne? Of course, if they do, what advantage is it for us to become a member of Berne if that is a fact?

Ambassador YEUTTER. Mr. Chairman, I would like to ask Emery Simon of my staff, who is very much involved in these individual negotiations, to respond if he would.

Before I do that, though, I might add that on your earlier question about specific examples, negotiating examples where our absence from membership in the Berne Convention comes back to haunt us, we'd be glad to join with Commerce in doing that. We probably have a lot more examples in USTR than Commerce would have.

Senator DECONCINI. We would welcome that.

Ambassador YEUTTER. It happens continually. Let me just add that this is not a rarity. It happens constantly.

I might also, if I may parenthetically, add to Senator Hatch's question that I suspect Commerce might want to add to the legal opinion since there is more experience in working with these kinds of issues in the Commerce Department than there would be in the State Department.

Senator HATCH. That would be fine.

Ambassador YEUTTER. Emery?

Mr. SIMON. On the question of piracy in Thailand and Egypt by the Berne signatories, unfortunately, piracy in those countries is a fact of life and it occurs both to U.S. works and to the works of nationals from Berne signatory countries. It strengthens our hand dramatically in our negotiations and consultations with those countries in trying, first of all, to get them to protect U.S. works directly and then, second of all, to get better enforcement of those rights.

Senator DECONCINI. Do countries that are Berne members do better in the courts than Egypt? Does Great Britain, France, or West Germany do better in those courts than we do? Or is there any record of that?

Mr. SIMON. We have had sketchy information, for instance, on the British experience in Egypt. Generally the British experience in Egypt is better than U.S. experience.

Is it consistent? Is there no piracy of British works? No, there is some piracy, but they have better enforcement rights than we do.

Ambassador YEUTTER. Let me, if I may, just supplement that a bit. If we were members of the Berne Convention, we could at least make an argument to those countries that, based upon some equity on our part—in other words, we can ask for some empathy and some consideration for our problems if we are a member of Berne. Without Berne membership, there's just no great reason for these two or any other countries to give us a heck of a lot of sympathy or effort in resolving our problems.

How much more they give to a country that is a member of Berne is another question. What happens is that some of these countries don't want to enforce Berne because they've discovered that piracy pays. The answer to that, of course, is the GATT negotiations that I discussed earlier.

One of the shortcomings, very frankly, of the standards-making organizations such as Berne and the Paris Convention in Patents is that they do very little in the enforcement or implementation area. But the two go hand in hand.

We need the membership of Berne in the copyright area to try to get the standards where they ought to be for all of these countries, including us, and then we need to go into the GATT with an enforcement mechanism that solves the kind of problems that you just enunciated.

Senator DECONCINI. Thank you, Mr. Ambassador.

Senator Hatch?

Senator HATCH. Well, this will certainly strengthen your hand, won't it, in your GATT negotiations and also bilateral negotiations. So it's a good tool for you from that standpoint.

Ambassador YEUTTER. Absolutely.

Senator HATCH. I have a lot of other questions, but I think what I'm going to do is submit them in writing, Mr. Chairman.

I would ask, Mr. Secretary, that your Department follow Clayton Yeutter's suggestion with regard to my question regarding constitutional law and litigation. If you would also add your opinion, I would appreciate it.

Secretary VERITY. We'd be happy to join with Ambassador Yeutter on that.

Senator HATCH. Thank you very much.

Mr. Chairman, thank you. I have to leave for another commitment.

Senator **DeConcini**. Thank you for being with us, Senator Hatch.

The Senator from Vermont?

Senator **Leahy**. Thank you.

Mr. Secretary, I'm delighted to see you here and delighted to see my good friend, Ambassador Yeutter, here also.

I understand this is your first congressional appearance since your confirmation, and Secretary Baldrige's last congressional appearance was before Congressman Kastenmeier's committee in support of Berne. I think it speaks eloquently of the commitment to that. We welcome you here. The fact that both of you have taken time to be here speaks also of the importance of this issue.

We've had a lot of discussion about the moral rights issue. Your testimony seems to take a very strong position against change in U.S. law on moral rights, either in this legislation or subsequent legislation. I think you said, if I'm quoting it right, "I would not come here on a Thursday claiming that we do not need to change our laws or plan to seek a moral rights bill on Friday."

But we look at this coalition supporting Berne, a very impressive, broad coalition. As I read their testimony and the positions they've taken in the past, either before our committee or letters I've received from them or articles they have written, there are differing views on the rights or on the value of moral rights legislation even among the coalition that's in support of Berne.

Some authors, for example, might support some change in U.S. law on moral rights, but, as I understand it, the whole coalition together is at least to join Berne. We don't have to reach the issue of moral rights. We don't have to reject it or we don't have to say that in the future we'll go forward with it. Is that correct? Is that your understanding also, that moral rights is not an issue that has to be reached, at least as far as joining Berne?

Secretary **Verity**. Well, my understanding is that nothing will change as far as the United States is concerned in moral rights by joining Berne. You were kind to mention the testimony that Secretary Baldrige gave last year, and he did a very good job on that subject. We picked up some of his phraseology in my official summary to you.

But, as I understand it, if we wanted to change anything in moral rights, this would be done by U.S. legislation.

Senator **Leahy**. I understand, but I think my point is that we do not have to take a preposition one way or the other on moral rights to join Berne.

Secretary **Verity**. To join Berne. I understand that, sir.

Senator **Leahy**. Ambassador Yeutter, is that your understanding also?

Ambassador **Yeutter**. That's correct.

Senator **Leahy**. Some of the coalition is opposed to moral rights and some favor it. I can understand, accept very much a number of the arguments on moral rights. I find some of them very, very appealing to me. I find even more appealing, though, getting into Berne, and I am perfectly willing to be involved in the debate on a moral rights bill subsequently, and I expect I probably will be. But I would like to see us get into Berne in the first place.

Ambassador YEUTTER. You're assessing that issue in exactly the right way, Senator Leahy. We need not get embroiled in that kind of debate at this stage, and probably should not do so, because it's important we join Berne and do so at an early date.

If people who have an interest in the moral rights issue want to propose legislation in the future that would in some manner alter existing American law, of course it's their privilege to do so. That can be debated here and elsewhere.

Senator LEAHY. I would urge both of you and the administration to work with all of us up here. Senator Hatch has a bill; others have a bill. I think we are much closer together on all those pieces of legislation than most people may feel. I think that we can get a consensus bill.

With everything else that you've got on your plates, if the administration can continue to work closely and carefully with us, I think we can get it out.

Ambassador YEUTTER. We'd be happy to do that, Senator Leahy. I really believe it is important that we try to have this legislation become law in 1988.

Secretary VERITY. I'd like to second the motion on that. I think we'd like to work very closely with you to see if we can finally move this bill. How we can help I don't know.

Senator LEAHY. You know, Secretary, we have all these discussions, of course, of how we're doing on our exports, pictures—and I'm chairman of the Agriculture Committee; I hear it there. We hear it in manufactured goods and all. In the copyright field, inadequate copyright protection, toleration of piracy—these are very real barriers, I would assume, to trade in copyrighted goods and that affects our overall trade picture; is that correct?

Secretary VERITY. Very definitely.

Ambassador YEUTTER. Enormously. Most people, Senator Leahy, have no recognition of the amount of trade that's involved here. We're talking about billions of dollars of lost U.S. exports. The reason for that, of course, is because we have more intellectual property to protect than anybody else in the world does and, therefore, we have more to be pirated than anybody else does.

Senator LEAHY. You're involved, Ambassador Yeutter, in bilateral negotiations. All these other countries are talking about removing barriers to trade goods. If we had adherence to Berne, would that assist you in those bilateral negotiations?

Ambassador YEUTTER. Yes; and it would permit us to use some of our leverage in other areas rather than this one. In other words, if we could get adherence to Berne throughout the world and enforcement of Berne, we could devote some of our attentions to other areas that also need work.

Senator LEAHY. Intellectual property areas?

Ambassador YEUTTER. Yes, other sides of the intelletual property equation and a lot of other things.

Senator LEAHY. Thank you. Thank you very much.

Thank you, Mr. Chairman.

Senator DECONCINI. Ambassador Yeutter and Secretary Verity, thank you very much for being with us. It's very helpful, and we welcome working with you. We appreciate your offer to assist us by submitting additional information. This record will remain open for several weeks. We thank you again for being with us today.

Secretary VERITY. Thank you, Mr. Chairman, and good luck.

[Responses of panelists to supplemental questions, subsequently submitted for the record, follow:]

UNITED STATES DEPARTMENT OF COMMERCE
Office of the Secretary
Washington, D.C. 20230

MAR 25 1988

Honorable Dennis DeConcini
Chairman
Subcommittee on Patents, Copyrights
and Trademarks
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman:

Thank you for your two letters regarding my testimony on the Berne Convention before your Subcommittee on February 18, 1988, containing supplemental questions for inclusion in the record of that hearing.

Responses to the supplemental questions are enclosed. They include the response of the Departments of Commerce and State.

Please do not hesitate to contact me if you or any members of your Subcommittee have further questions regarding the important issue of U.S. adherence to the Berne Convention.

Sincerely,

C. William Verity
Secretary of Commerce

Enclosures

Senator DeConcini

QUESTIONS FOR SECRETARY VERITY

Q1. Protection for U.S. innovation depends on the patent system. Delays in providing this protection are jeopardizing the U.S. leadership position in biotechnology. What steps is the Patent Office taking to accelerate issuance of enforceable patents (product and process claims) so that offshore infringers can be prevented from exporting into the U.S.?

A1. Biotechnology is one of the fastest-growing areas of research in the world. It has a voracious appetite for new researchers, and it turns out a veritable flood of innovations. Consequently, patent applications are being filed at an ever-increasing rate. This is putting a strain on the examining unit responsible for processing the applications.

Moreover, to function in such a complex field a patent examiner must be as highly-trained as a researcher in industry. The problem we face is that it is difficult to recruit such people. We simply cannot offer skilled professionals the levels of salary and benefits they can get in private industry.

The Patent and Trademark Office is working hard to cope with this growing workload, however, and we expect that the changes we are making will speed up the issuance of both product and process patents in this area.

We are reorganizing and expanding the Examining Group responsible for processing biotechnology applications. All biotechnology examining responsibility will be consolidated in the new group. We are seeking to hire as many new examiners as can be trained, on an accelerated basis. Overtime will be increased to the maximum level sustainable. Examiners in other groups who can be retrained will be transferred to examine biotechnology applications. Procedures are already in place to provide for accelerated examination to meet the needs of the applicant. These procedures are available to biotechnology applications.

In addition, the Administration has proposed legislation to make the importation of products made abroad through the unauthorized use of a U.S. process patent an act of infringement. Our bill will give U.S. holders of process patents an effective alternative to an unfair trade practice proceeding, and one that will allow them to recover monetary damages.

Senator Heflin

QUESTIONS FOR SECRETARY VERITY

Q1. In your testimony, you state that piracy is a problem and that in 1984, it cost U.S. industries more than $1.3 billion in only ten countries.

Do you recall which ten countries were involved?

Are they members of Berne? It would seem to me that if they were not, we would not make much of a dent in recouping our losses due to piracy?

Assuming that they are members of the Berne convention, what would stop the pirates from closing up shop and establishing their business in another country that is not a member of Berne?

Do you have any figures on how the $1.3 billion broke down by category such as books, movies, records, computer programs, etc?

How does this loss compare to the loss in Berne member countries such as England?

A1. The ten jurisdictions covered by the study were Singapore, Taiwan, the Republic of Korea, the Philippines, Malaysia, Thailand, Brazil, Egypt and Nigeria. Of these the Philippines, Thailand, Brazil and Egypt are Berne members.

At the time the study was done in 1984, we had copyright relations with Taiwan, the Philippines, Thailand, Brazil and Nigeria. With the exception of Thailand the problems were not with eligibility for protection, but with inadequacies in the law or in its enforcement.

The case of Thailand deserves special mention. For many years Thailand was the shining example in southeast Asia of a country that showed respect for international copyright. Thailand has been a member of the Berne Convention since 1921, and has had copyright relations with the United States through a series of bilateral agreements. However, in 1984 the situation changed. A Thai court ruled that U.S. works were not protected in Thailand through the latest bilateral agreement because it had never been proclaimed properly under Thai law. The court also ruled that the relevant article of the Thai copyright law did not recognize a bilateral agreement as a basis for protecting foreign works in Thailand. The court ruled that U.S. works would be protected in Thailand only if such works were simultaneously published in a Berne country. The plaintiff ultimately prevailed in that case, but only after the U.S. copyright owner incurred the great expense of sending several witnesses to Thailand to testify on the issue of simultaneous publication. However, in another case, a Thai court refused to accept proof of simultaneous publication in Canada, a Berne country, because the copyright owner had failed to comply with the voluntary copyright registration procedure in Canada.

We are presently trying to rectify this situation through bilateral efforts. An amendment to the relevant article of the Thai copyright law is before the Thai parliament. Its passage is uncertain, however, and we have been repeatedly asked by the Thai negotiators why we do not join Berne and solve the problem.

In 1984 losses to piracy of U.S. copyrighted works in Thailand amounted to $34 million. The recently-released International Trade Commission study, Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade, estimates losses in 1986 to be $38.7 million.

Berne membership would give us protection immediately in Egypt, another important trouble spot. Firms responding to the ITC study estimate their losses to be $95 million for 1986 in the record and tape and publishing industries alone.

Nothing will stop a pirate from relocating its business from a country with which we have copyright relations to one with which we do not. What Berne membership will do is eliminate 26 of the present safe havens where the pirates can relocate with impunity.

The 1984 losses in the ten markets break down as follows:

ESTIMATED LOSSES FROM PIRACY
IN TEN SELECTED COUNTRIES
(in millions)

	Records/ Tapes	Motion Pictures	Books	Software	Total
Singapore	$220	$ 11	$107	$ 29	$358
Taiwan	$ 9	$ 25	$118	$ 34	$186
Indonesia	$180	$ 17	$ 6	$ 3	$206
Korea	$ 40	$ 16	$ 70	$ 20	$145
Philippines	$ 4	$ 19	$ 70	$ 4	$ 97
Malaysia	$ 33	$ 13	$ 20	$ 7	$ 73
Thailand	$ 13	$ 12	$ 7	$ 2	$ 34
Brazil	$ 19	$ 13	$ 8	$ 35	$ 75
Egypt	$ 5	$ 5	$ 10	$ 3	$ 23
Nigeria	$120		$ 11		$131
TOTAL	$643	$131	$427	$128	$ 1329

We do not have comparative figures on losses in other Berne member countries. It has been reported, however, that U.K. publishers have successfully enforced their copyrights in Egypt through raids on pirates conducted by Egyptian police. U.S. firms have not enjoyed this success because the police are unwilling to act where the claim to protection is based on simultaneous publication under the Berne Convention. The recording industry similarly reports that the Thai police regularly raid establishments selling counterfeit video and audio tapes from Berne member countries, but they will not conduct similar raids to protect U.S. works because of the uncertain copyright relations between the two countries.

Q2. In your testimony, you mention that bilateral discussions with Indonesia, Malaysia, Singapore and Taiwan have led to improvements.

How do you define improvements? Have pirating operations been closed down to a significant degree? Have U.S. industries brought suit and been successful in their effort?

A2. I define improvements as the increased likelihood of effective protection of U.S. copyrighted works in foreign markets. Improvements have occurred on several levels. First, we have encouraged foreign countries to improve their local laws. Second, we have entered into copyright relations with those countries to make U.S. works eligible for protection. Third, we have continued to monitor progress to ensure that the laws are being enforced. A few examples are illustrative.

Taiwan. In 1984 our copyright relations with Taiwan were strained because the pre-1985 copyright law denied effective protection to foreign works. For example, works were protected only if the copyright owner complied with burdensome and expensive registration procedures. Once protection was obtained, moreover, enforcement was ineffective because of inadequate penalties.

Following extensive consultations with Taiwanese authorities, a new copyright law was enacted in 1985 that extended the term of protection, broadened the scope of coverage to include new works such as computer programs, and reduced reliance on formalities. Following further negotiation, the authorities on Taiwan agreed to give U.S. works full national treatment under the new law. This means that U.S. works are protected in Taiwan without the need to register. Just as in the United States, registration is merely a precondition to bringing a suit.

The Association of American Publishers reports that in the year after the new law was enacted, sales of legitimate copies in Taiwan increased 300%, even though no lawsuits were commenced. This is not to say that all problems have been eliminated. U.S. copyright owners still do not enjoy the protection of a translation right in Taiwan. Problems also exist concerning the protection of some pre-1985 works, and enterprising pirates continue to meet local demand with unauthorized copies. However, the new law has provided U.S. copyright owners with the means to combat this piracy. By all accounts, they are achieving success.

Singapore. The United States did not have copyright relations with Singapore, which at one time was regarded as the world capital of copyright piracy. Following extensive consultations beginning in 1984, Singapore decided to clean up its act, moving quickly to enact a modern copyright law that protects both traditional and new works. After the new law came into effect, Singapore entered into bilateral relations with the United States. Once the government announced its intention to enact a new copyright law, the local market fell from virtually 100% pirated product to only 30% pirate product, according to estimates by the International Federation of Phonogram and Video Producers. All reports received since relations were established indicate that enforcement of the law has continued to contain piracy.

Indonesia and Malaysia. In both Indonesia and Malaysia the copyright laws have been improved significantly. In October 1987 Indonesia amended its copyright law to extend the term of protection from life-of-the-author plus 25 years to a term of generally life plus 50 years. The new law broadened the subject matter of protection to include computer programs and sound recordings, and provided a basis for the protection for foreign works. In December 1987, the new Malaysian copyright law came into force. The term of protection was extended to life plus 50 years and coverage of the law was broadened to include computer programs. In both countries, the new laws include very strong enforcement provisions. We are in the process of establishing bilateral relations with both countries, and Indonesia is considering adherence to the Berne Convention. Even though U.S. works are not yet protected under the new Malaysian law, it is reported that pirated sound recordings are becoming a thing of the past.

Korea. Following President Reagan's initiation of an investigation under section 301 of the Trade Act of 1974, the Republic Of Korea enacted a new copyright law and a new software copyright law. The ROK also joined the Universal Copyright Convention and the Geneva Phonograms Convention. Although the new ROK copyright law would have permitted adherence to Berne, we insisted that the ROK become a member of the U.C.C. to assure the protection of U.S. works. As a condition to termination of the section 301 investigation, the ROK agreed to apply transitional protection through administrative guidance to protect certain existing U.S. works. I am happy to note that this arrangement appears to be working.

Finally, I would like to tell you that my negotiators and intellectual property experts report that in all of these countries, they are asked why we don't belong to Berne. Foreign trade negotiators want to know why we can't take the short step needed to move our law into compatibility with Berne when we expect them to take giant steps in improving their laws. We simply have to deny this tactical advantage to those who would pirate our products. Improving intellectual property protection requires political as well as technical efforts, and we shouldn't give any country a ready political reason to balk when it comes to dealing with piracy.

Senator Hatch

QUESTIONS FOR SECRETARY VERITY

Q1. The preface to S. 1971, the Administration's bill, states that the treaty would not be self-executing. Thus, obligations of the United States under the treaty would only be binding if implemented by domestic law. Does this mean that the United States would only be bound by the moral rights found in Article 6*bis* of the treaty if it implemented those rights by legislation? Do you see any need to create moral rights beyond current Federal and State law in order to comply with the Berne Convention?

A1. Whether or not a particular treaty is self-executing is a matter to be determined by domestic law. It is widely accepted that the Berne Convention is not a self-executing treaty in the United States. To change U.S. copyright law, Congress must pass legislation. In the case of the rights set forth in Article 6*bis* -- to be named on the work as its author and to object to certain prejudicial uses of the work -- we firmly believe that no further legislation is needed. These rights are already protected under the entirety of U.S. Federal and State law at a level sufficient to satisfy the requirements of Article 6*bis*.

Q2. In the past few weeks, I have heard from several publishers and broadcasters who are concerned about moral rights. They fear that they could be sued under the treaty by any author who disliked the editing done on his article, or that they could be sued by an author whose article appeared next to a cigarette ad or otherwise in a negative context. Broadcasters have mentioned that they might be sued if they fail to mention the composer after each song on the radio. Do you think publishers or broadcasters have any reason to fear this kind of moral rights litigation?

A2. Many businesses are threatened with suit or are actually sued each day. Nothing that the Congress can do will prevent a U.S. citizen from seeking relief in the courts. Indeed, publishers and broadcasters could be sued today for such acts. Whether these suits will be successful is another matter. The facts of the particular case and the relevant Federal and State law in the jurisdiction where the legal action is filed will determine its outcome. Adherence to Berne will not change that. All of the pending bills explicitly provide that rights or interests in works protected under copyright that derive from the Federal or State statutes or the common law are neither expanded nor reduced by virtue of the provisions of the Berne Convention. Consequently, while I am sensitive to these concerns, I simply cannot agree that adherence to Berne will increase the risk that publishers and broadcasters will be exposed to liability for such acts.

Q3. Recently a constitutional issue has arisen in connection with the moral rights question. As this argument goes, the Constitution mentions creation of exclusive rights for authors "to promote the progress of science and useful arts." Thus, as I understand this argument, the Constitution permits copyright protection only for the benefit of the general public. If expansive moral rights of authors were implemented, would this conflict with the Constitution's public benefit theory of copyrights? Do you see any constitutional concerns with the moral rights of Berne?

A3. The constitutional provision in Article I, section 8, clause 8 gives the Congress broad latitude to enact appropriate incentives to promote authorship and the progress of science, as long as no perpetual rights are granted. Such rights of authors would seem to include moral as well as economic rights. However, no proposal for the Berne implementation legislation includes specific provisions recognizing any moral rights, let alone "expansive moral rights". As we have determined, present U.S. law provides an author with protection that is equivalent to the minimum moral rights recognized in Article 6bis of Berne. If specific moral rights legislation is unconstitutional, questions may be raised concerning the constitutionality of the protection currently available. There is no merit in this contention.

Q4. Would you expect any constitutional litigation on this point?

A4. Although it is difficult to state with absolute certainty what issues might be raised in a lawsuit, we do not expect any constitutional litigation on this point, particularly considering that we do not expect, or see the need for, any legislation concerning moral rights.

Q5. As you know, the Berne Convention prohibits any unnecessary "formalities" which might present an obstacle to international copyright protection. In the United States, we require registration in order to enjoy full copyright benefits. Do you think this is a formality which would need to be changed to comply with Berne?

A5. The Administration's bill, like Chairman Kastenmeier's bill, proposes only those changes in the registration system that are required, by making use of the copyright notice voluntary. We do not propose to change the requirement that works be registered before suit may be brought. There is substantial agreement that registration as a precondition to suit is a procedural rather than a substantive formality. Hence, it is not prohibited under Berne.

Q6. How would ratification of Berne further our efforts to negotiate broader intellectual property protections in the GATT negotiations and in bilateral negotiations?

A6. Ratification of Berne will send a clear signal that the United States is firmly committed to the highest international standards of copyright protection. Department officials who have been working with our colleagues in the Department of State and the Office of the United States Trade Representative report that the question of our non-adherence to Berne is inevitably raised in negotiations with foreign governments concerning copyright protection. Adherence to the Berne Convention will increase significantly our credibility in both bilateral and multilateral negotiations.

Senator Grassley

QUESTIONS FOR SECRETARY VERITY

Q1. What are the advantages of the Berne treaty? After all, it is a treaty that is 100 years old and the U.S. has never signed it.

A1. For over 100 years the Berne Convention has set the highest international standards for copyright protection. Until enactment of the 1976 Copyright Act, our copyright law simply did not measure up to those standards, and we could not join Berne. Following revision and the expiration of the manufacturing clause, however, our law needs only small changes to become fully compatible with the standards of Berne. Adherence to Berne is important to U.S. interests for a number of reasons, including the following: First, it will give us clear protection in 24 countries where protection for U.S. works is at best uncertain. Second, adherence will put the United States in a position to exert greater leadership in international copyright relations commensurate with our preeminent position in the world as a producer of copyrighted materials. Third, our membership in the Berne Convention would give us a role in its administration and management. As a member State of the Berne Convention, the United States would be a voting participant in the next revision conference and, under the Berne "rule of unanimity", would be able to veto proposals detrimental to U.S. interests. Fourth, membership in the Berne Convention would greatly strengthen U.S. efforts in multilateral negotiations in the GATT for an intellectual property agreement, and in bilateral negotiations with developing countries to follow the high copyright standards of Berne.

Q2. How will Berne adherence affect U.S. trade negotiations, specifically, our role within the GATT?

A2. One of the reasons for Berne adherence is that it will support our efforts in the GATT. The United States is proposing the creation of enforceable intellectual property standards in the GATT. In the area of copyright, these standards are largely drawn from the principles of the Berne Convention.

SENATOR HATCH

QUESTIONS FOR SECRETARY VERITY AND STR YEUTTER

1. THE PREFACE TO S. 1971, THE ADMINISTRATION'S BILL, STATES THAT THE TREATY WOULD NOT BE SELF-EXECUTING. THUS, OBLIGATIONS OF THE UNITED STATES UNDER THE TREATY WOULD ONLY BE BINDING IF IMPLEMENTED BY DOMESTIC LAW. DOES THIS MEAN THAT THE UNITED STATES WOULD ONLY BE BOUND BY THE MORAL RIGHTS FOUND IN ARTICLE 6 BIS OF THE TREATY IF IT IMPLEMENTED THOSE RIGHTS BY LEGISLATION? DO YOU SEE ANY NEED TO CREATE MORAL RIGHTS BEYOND CURRENT FEDERAL AND STATE LAW IN ORDER TO COMPLY WITH THE BERNE CONVENTION?

2. IN THE PAST FEW WEEKS, I HAVE HEARD FROM SEVERAL PUBLISHERS AND BROADCASTERS WHO ARE CONCERNED ABOUT MORAL RIGHTS. THEY FEAR THAT THEY COULD BE SUED UNDER THE TREATY BY ANY AUTHOR WHO DISLIKED THE EDITING DONE ON HIS ARTICLE OR THAT THEY COULD BE SUED BY AN AUTHOR WHOSE ARTICLE APPEARED NEXT TO A CIGARETTE AD OR OTHERWISE IN A NEGATIVE CONTEXT. BROADCASTERS HAVE MENTIONED THAT THEY MIGHT BE SUED IF THEY FAIL TO MENTION THE COMPOSER AFTER EACH SONG ON THE RADIO. DO YOU THINK PUBLISHERS OR BROADCASTERS HAVE ANY REASON TO FEAR THIS KIND OF MORAL RIGHTS LITIGATION?

3. RECENTLY A CONSTITUTIONAL ISSUE HAS ARISEN IN CONNECTION WITH THE MORAL RIGHTS QUESTION. AS THIS ARGUMENT GOES, THE CONSTITUTION MENTIONS CREATION OF EXCLUSIVE RIGHTS FOR AUTHORS "TO PROMOTE THE PROGRESS OF SCIENCE AND USEFUL ARTS." THUS, AS I UNDERSTAND THIS ARGUMENT, THE CONSTITUTION PERMITS COPYRIGHT PROTECTION ONLY FOR THE BENEFIT OF THE GENERAL PUBLIC. IF EXPANSIVE MORAL RIGHTS OF AUTHORS WERE

IMPLEMENTED, WOULD THIS CONFLICT WITH THE CONSTITUTION'S PUBLIC BENEFIT THEORY OF COPYRIGHTS? DO YOU SEE ANY CONSTITUTIONAL CONCERNS WITH THE MORAL RIGHTS OF BERNE?

4. WOULD YOU EXPECT ANY CONSTITUTIONAL LITIGATION ON THIS POINT?

5. AS YOU KNOW, THE BERNE CONVENTION PROHIBITS ANY UNNECESSARY "FORMALITIES" WHICH MIGHT PRESENT AN OBSTACLE TO INTERNATIONAL COPYRIGHT PROTECTIONS. IN THE UNITED STATES, WE REQUIRE REGISTRATION IN ORDER TO ENJOY FULL COPYRIGHT BENEFITS, DO YOU THINK THIS IS A FORMALITY WHICH WOULD NEED TO BE CHANGED TO COMPLY WITH BERNE?

6. HOW WOULD RATIFICATION OF BERNE FURTHER OUR EFFORTS TO NEGOTIATE BROADER INTELLECTUAL PROPERTY PROTECTIONS IN THE GATT NEGOTIATIONS AND IN BILATERAL NEGOTIATIONS?

SENATOR GRASSLEY

QUESTIONS FOR SECRETARY OF COMMERCE VERRITY, AMBASSADOR YEUTTER AND UNDERSECRETARY OF STATE WALLIS

1. WHAT ARE THE ADVANTAGES OF THE BERNE TREATY? AFTER ALL, IT IS A TREATY THAT IS 100 YEARS OLD AND THE U.S. HAS NEVER SIGNED IT.

3. HOW WILL BERNE ADHERENCE AFFECT U.S. TRADE NEGOTIATIONS, SPECIFICALLY OUR ROLE IN GATT?

THE UNITED STATES TRADE REPRESENTATIVE
Executive Office of the President
Washington, D.C. 20506

WASHINGTON
1988 MAR 17 PM 2:59

March 11, 1988

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents, Copyrights
and Trademarks
United States Senate
Washington, D.C. 20510-6275

Dear Dennis:

I appreciated the opportunity to testify before your subcommittee on U.S. adherence to the Berne Convention. I cannot overstate the importance of joining the Berne Convention to our multilateral efforts to improve protection of intellectual property rights through the Uruguay Round negotiations.

During the past week, the United States hosted an informal meeting of intellectual property experts from countries interested in moving the Uruguay Round effort on intellectual property forward. The copyright discussions focused in large part on the standards of protection provided in the Berne Convention and U.S. efforts to join that Convention. Our adherence to Berne will significantly improve the U.S. negotiating position not only with regard to copyright provisions in a GATT agreement, but will increase our credibility on the intellectual property issue as a whole.

I have enclosed responses to questions posed by members of your subcommittee. I look forward to working with you and your subcommittee in the future on the important issue of protection of intellectual property rights.

Sincerely,

Clayton Yeutter

CY:cf

1. The Administration strongly believes that the Berne Convention for the Protection of Literary and Artistic works is not self-executing. Consequently, rights and obligations flow from the Berne Convention only to the extent that its provisions are implemented through Federal and State laws and judicial decisions. However, the United States cannot pick and chose those portions of Berne that it finds acceptable and simply implement individual provisions. With regard to moral rights, the Administration believes and proposed legislation states that the United States provides sufficient protection for moral rights to permit adherence to Berne. Moreover, foreign experts on the Berne Convention including the Director-General of the World Intellectual Property Organization have stated that the United States provides sufficient protection of moral rights.

2. The Administration is not proposing additional legislation that would enhance current protection of moral rights. Although some parties may attempt to use adherence to the Berne Convention as an argument in litigation, the courts should apply the same substantive standards for assessing whether there is a violation of any right that exists currently.

3. Provision of certain rights to authors and creators can have the effect of providing incentives for future creative activity. We cannot assume that providing moral rights would have a detrimental affect on the progress of science and useful arts. The Administration, however, is not proposing to implement any additional moral rights. Thus, we do not see any Constitutional problems with the proposed implementing legislation. Furthermore, Congress possesses other authority for addressing the moral rights issue such as the right to regulate foreign and interstate commerce.

4. The Administration cannot preclude litigation based on arguments such as those presented in question 3. We do not believe, however, that such litigation would be successful.

5. Proposed legislation would eliminate mandatory notice requirements for copyright protection. If notice appears on copies, a defendant in a copyright infringement suit cannot claim a defense based on "innocent infringement" in mitigation of damages. The Administration believes that these changes are sufficient to bring U.S. law into conformity with Berne requirements. Expert opinion on the issue of whether this is prohibited formality is not unanimous. The World Intellectual Property Organization, however, has indicated that Berne membership would not be denied on this point.

6. Ratification of Berne would significantly enhance our efforts to negotiate a broad intellectual property agreement in the Uruguay Round negotiation of the GATT and would also assist our bilateral efforts. During a recent informal meeting of intellectual property experts, U.S. adherence to the Berne Convention was a major topic of discussion. Many of the supporters of the effort to reach an agreement believe that the Berne Convention should provide the basis for copyright standards in any such agreement. Our non-adherence to Berne subjects us to criticism and diminishes the strength of arguments regarding the coverage of Berne (i.e. does Berne require copyright protection for computer software) and suggestions for clarifying ambiguities in that agreement.

Bilaterally adherence to Berne will be a positive development in a number of ways. First, countries such as the Republic of Korea often chose to join the Universal Copyright Convention instead of Berne and thus must provide less protection for works of U.S. authors. It is difficult for the United States to insist that these countries adhere to Berne or give Berne-equivalent protection when we do not adhere to the Berne Convention.

Second, the United States would automatically have copyright relations with the twenty-four countries that adhere to Berne but not to the Universal Copyright Convention. This would diminish the need for extended bilateral negotiations to establish such rights around the world.

1. The Berne Convention For the Protection of Literary and Artistic Works provides better protection for works of U.S. authors than the Universal Copyright Convention (UCC)--the other major international convention dealing with basic copyright protection. Berne provides for longer terms of protection and more countries adhere to Berne than the UCC.

   Our failure to adhere to the Berne Convention results from some provisions that formerly existed in U.S. copyright laws, such as the manufacturing clause, and other provisions that will be removed from current law such as the juke box license provision and lack of protection for architectural works. Early in this century, the United States chose to take a different approach to copyright protection than other countries. We took major steps to eliminate those inconsistencies in 1976 and are finishing the task with the current implementing legislation.

2. Adherence to Berne will clearly enhance our position in the GATT negotiations on protection of intellectual property. The Berne Convention is the most highly respected international treaty in the area of copyright protection and its standards provide a guideline for standards for inclusion in any GATT agreement on protection of intellectual property rights.

   Our failure to adhere to the Berne Convention diminishes our credibility in international negotiations. Many countries see U.S. reluctance or inability to take the remaining steps necessary to join Berne as an indication of lack of commitment and political will to the issue of improved protection of intellectual property rights. Moreover, refusal or inability to amend U.S. copyright laws is viewed as a lack of flexibility in the negotiations, i.e., the United States will have to insist on U.S. standards for any GATT intellectual property agreement.

   During a recent informal meeting of intellectual property experts, several delegations raised the importance of U.S. adherence to the Berne Convention. All delegations viewed recent progress as a positive factor in the GATT negotiations.

JOSEPH R. BIDEN, Jr., DELAWARE, CHAIRMAN
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ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
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MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
DENNIS W. SHEDD, MINORITY CHIEF COUNSEL

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

P 1: 21

THE U.S ADE
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March 8, 1988

The Honorable Clayton Yeutter
U.S. Trade Representative
600 17th Street, NW
Washington, DC 20506

Dear Representative Yeutter:

Enclosed please find questions which Senator Heflin has asked to be included in the hearing record for the February 18, 1988 hearing on the Berne Convention.

I would appreciate your answer to these questions by March 15, in order that the questions and answers will appear in the printed record.

Sincerely,

Dennis DeConcini

Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks

SENATOR HEFLIN

QUESTIONS FOR AMBASSADOR YEUTTER AND UNDERSECRETARY WALLIS

1. Several witnesses have stated that there is a risk of possible retaliation against U.S. copyrighted works by Berne member states who may resent our "free ride" on the Berne Convention through simultaneous publication in the U.S. and a Berne member state.

What evidence do we have that this is a real possibility? Do either of you know of any country that has expressed such an intention?

What type of retaliation is authorized by Berne?

Answer: Article 6 of the Berne Convention allows the restrictions to be imposed on the rights of authors not living in a Berne member countries. While we have had no specific indication that such restrictions are about to be imposed on U.S. authors, the threat of possible retaliatory action is real.

United States Department of State

Washington, D.C. 20520

MAR 21 1988

Dear Senator DeConcini:

I am writing in reply to your letter of March 8, 1988 to the Under Secretary for Economic Affairs, Allen Wallis, with which you enclosed certain questions which Senator Heflin has asked be included in the hearing record for the February 18, 1988 hearing on the Berne Convention.

I have enclosed answers to these questions and hope that they will be helpful to Senator Heflin.

Sincerely,

J. Edward Fox

J. Edward Fox
Assistant Secretary
Legislative Affairs

Enclosure:
As stated.

The Honorable
Dennis DeConcini, Chairman,
Subcommittee on Patents, Copyrights and Trademarks,
Committee on the Judiciary,
United States Senate.

1. Several witnesses have stated that there is a risk of retaliation against U.S. copyrighted works by Berne member States who may resent our "free ride" on the Berne Convention through simultaneous publication in the U.S. and a Berne member State.

What evidence do we have that this is a real possibility?

Article 6 of the Berne Convention allows member states of the Berne Convention to retaliate against non-member States obtaining protection by simultaneous publication in a Berne country. This provision dates back to 1914. Essentially, it provides that if a Berne country finds that a non-member state "fails to protect in an adequate manner" works of the authors of the Berne country, the latter "may restrict the protection given to the works of authors" who are nationals of the offending state. In short, the "retaliation" is a cutting back on the rights which works protected through simultaneous publication would otherwise enjoy by virtue of the national laws of Berne countries and the rights in the Berne Convention.

This provision was introduced in the Berne Convention at the request of the United Kingdom, largely because of the U.S. "manufacturing clause" in our Copyright Law which generally required the manufacture in the United States of all English language works in order to obtain copyright protection in the U.S. Since 1914 only the United Kingdom and a number of countries which became members of the Commonwealth introduced into their laws provisions for discrimination against the authors of countries which denied adequate protection to works of the former countries' nationals.

The only country to have exercised this retaliation against the United States is Canada, which still has certain compulsory licensing and import provisions in its copyright law cutting back on exclusive rights with respect to books and periodicals. This legislation is not applied to Berne member states. In its current program for copyright law revision the Government of Canada has stated its intention to repeal these provisions.

Although the situation could change, there is currently no evidence that members of Berne are seriously considering retaliation against the United States if we do not adhere to the Berne Convention. Berne states have urged the United States to enter Berne in our interest, in their interest, and in furtherance of the growth of copyright globally.

2. Do you know of any country that has expressed such an intention?

In 1982 when the United States extended the manufacturing clause until July 1, 1986, the United Kingdom and several Berne members who comprise the European Community called attention to the possibility of retaliation under the Berne Convention. In the final analysis, the attack of these Berne member States focused on the manufacturing clause and was centered in the General Agreement on Tariffs and Trade (GATT). No official steps toward Berne-related retaliation were taken.

3. What type of retaliation is authorized by Berne?

The power of a Berne state to retaliate under Article 6 against a non-Berne state which does not protect the works of the concerned Berne state in "an adequate manner" is confined by precise conditions. First, no permitted retaliation can be applied retroactively. Second, any state invoking the retaliatory power must notify the Secretariat for the Berne Convention, the World Intellectual Property Organization (W.I.P.O.) in writing of such action, specifying the countries in respect of which protection is to be restricted and the substance of such restrictions. This information is thereafter communicated to all Berne member States.

Under Article 6, Berne states are allowed to "restrict" protection, but not withhold it entirely. In the absence of any real experience, it is hard to draw a clear line between appropriate and excessive "restrictions" on protection.

There are no real guidelines controlling the circumstances under which a Berne state may choose to retaliate against a non-member country for allegedly inadequate protection. A number of important European states recently have adopted various measures to restrict participation of foreign works in systems to remunerate rightsholders for private copying, rental rights, and similar new media for distribution of audiovisual works. If the United States wishes to maintain its national system which limits rental rights after first sale, or to preserve the de facto private copying privileges derived from the Betamax case and if European states move gradually in other directions, real balance of payments considerations may prompt certain states to use Article 6 as a legitimate means to cut valuable U.S. works out of their markets in these areas.

Only by joining Berne can the United States be certain of preventing resort to Article 6 by any Berne member which may be concerned over excessive profits from new uses flowing to the United States. Even in the absence of a clear and present danger of such a step, in a rapidly changing and trade-charged global environment, Berne adherence to avoid such a possibility is a sound preventative step.

Senator DeConcini. Our next witness will be Ralph Oman, Register of Copyrights. And, Dorothy Schrader, we welcome you today to the committee. We thank you for your continued assistance in these areas and your testimony.

We ask that, due to time constraints—some of us have to be with Chancellor Kohl this morning, so we ask that you summarize, Mr. Oman, if you would, your remarks. Your full remarks will appear in the record as if read. I was just looking at them and they are very extensive, and we thank you for the time that you and Ms. Schrader put into those remarks. Would you please summarize for us?

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL, AND LEWIS FLACKS, POLICY PLANNING ADVISOR

Mr. Oman. Thank you very much, Mr. Chairman. I would be happy to summarize. I would also request your permission to ask Mr. Lewis Flacks, Policy Planning Advisor and expert on the Berne Convention, to join me.

Senator DeConcini. Mr. Flacks, please join us.

Mr. Oman. The Copyright Office, as you have mentioned, has prepared extensive written remarks on Senator Leahy's bill and on Senator Hatch's bill, and, with your permission, I will submit those comments for the record.

Before turning to the two remaining controversies, moral rights and architectural works, I want to affirm that the Copyright Office strongly supports U.S. adherence to the Berne Convention. Berne adherence will enable the United States to take its proper place in the international community as a leader of both Berne and the Universal Copyright Convention and will send an unmistakable signal to all countries that we place great value on balanced protection of copyrighted works.

Both S. 1301 and S. 1971 take the minimalist approach that has been discussed this morning. Both bills agree on several major points, such as clauses guarding against self-execution and retroactive application, on the elimination of the notice requirement, and on the acceptance of the jukebox compromise.

When renewed interest in joining Berne arose a few years ago, the Copyright Office supported a full public debate in order to identify the necessary changes in our law. To your great credit, Mr. Chairman, and that of Senator Leahy and that of Chairman Kastenmeier, we have had a lively public debate on the pros and cons of U.S. adherence to the Convention.

We achieved consensus on many of the issues that were seen as roadblocks to adherence. Modification of the jukebox compulsory license appears acceptable to all parties. No one is opposed to the elimination of the copyright notice requirement, and we have confirmed the public interest in the registration system and of mandatory deposit to the benefit of the Library of Congress.

On this point, the Copyright Office endorses the approach of S. 1971, Senator Hatch's bill, since it preserves the full panoply of incentives to registration and it's consistent with the minimalist approach to implementing legislation.

First, let me talk about moral rights briefly. Resolving the moral rights controversy remains the single most hotly debated issue on the path to adherence to the Berne Convention. After reviewing all of the arguments, I agree that we need not enact specific moral rights legislation because sufficient protection is available under alternative State law remedies and the Federal Lanham Act to meet the Berne standards.

Both S. 1301 and S. 1971 endorse the position that no change concerning moral rights would be required by U.S. adherence to the Berne Convention.

If Congress agrees that a mix of existing copyright and noncopyright remedies form the basis for meeting our moral rights obligations, then we must take special care to insure that nothing in the implementing legislation hampers the appliation of these alternative remedies.

Senator Leahy's bill contains no provision specifically addressing moral rights except to make clear that there is no reduction in any right or interest in works protected under title 17, U.S. Code, arising under other Federal or State laws.

Senator Hatch's bill affirmatively states that title 17 does not provide an author with the right to be named as the work's author or to object to uses or changes to the work that would prejudice the author's reputation or honor, and specifically provides that alternative legal remedies for protecting these rights shall neither be enlarged nor diminished by this act.

Whichever approach Congress finally adopts, the committee report should make clear that the alternative remedies, especially the State law remedies, are not preempted by section 301 of the Copyright Act.

Now let me turn briefly to protection of architectural works. We have really had insufficient public debate on this extremely complex area of the law, and we can't yet assess the impact of protecting under copyright an architect's final product; in other words, buildings and other structures. I am confident that the adherence process can go forward on the basis of existing U.S. protection for blueprints and the original artistic features of a building and also on existing noncopyright State law remedies.

The subcommittee may wish to study this issue in greater depth, and the Copyright Office is at your disposal to help in such a study.

But if the subcommittee decides to continue existing law in this point, it is vitally important that the committee reports clearly reconfirm the principle stated in section 101 of the Copyright Act—the definition of pictorial, graphic, and sculptural works—and section 113 of the Copyright Act.

Specifically, we must stress two points. First, under the present Copyright Act, copyright in a technical drawing does not confer copyright protection in three-dimensional, utilitarian designs and objects such as buildings.

Second, Congress intends no change whatsoever in the separability standard expressed in the 1976 act and the committee reports. We want to keep clear the demarcation between protectable artistic works and unprotectable designs of useful articles.

The Copyright Office, without prejudging the legislative outcome, has already begun internally a process of preparing for changes in copyright regulations and administrative practices that would be required by the implementing legislation. We are also preparing to offer brochures and other printed information and to undertake an ambitious, nationwide lecture tour that will help educate the country on the changes in the law and our new obligations under the Berne Convention and the implementing legislation, if Congress, in fact, passes it.

Our preparations are simply a matter of prudence. We will await the further deliberations by the Congress with respect to the pending bills and, as always, the Copyright Office is standing by ready to help the subcommittee with any technical assistance you may request.

I would be pleased to answer any questions.

[The prepared statement of Mr. Oman follows:]

Statement of Ralph Oman
Register of Copyrights and
Assistant Librarian for Copyright Services

Before the Senate Subcommittee on Patents, Copyrights and Trademarks
Senate Judiciary Committee
100th Congress, Second Session
February 18, 1988

Mr. Chairman and members of the Subcommittee, it is a privilege to appear before you today to talk about S. 1301, S. 1971, and the Berne Convention for the Protection of Literary and Artistic works.

Both S. 1301 and S. 1971 propose to amend title 17 of the United States Code to enable the United States to meet the obligations of the Berne Convention for the Protection of Literary and Artistic Works (hereafter "Berne"), as revised at Paris on July 24, 1971, and become a member of this 100-year old treaty. Both proposals purport to take a minimalist approach, meaning that they propose changes only where changes are required to make United States copyright law consistent with the clear obligations of Berne. The two bills do differ, however, reflecting the lack of consensus on some Berne related issues.

S. 1301 sponsored by Senator Leahy is largely derived from the Mathias Bill, S. 2904, which pioneered the Berne adherence issues in the 99th Congress. S. 1971, introduced by Senator Hatch, is the Reagan administration's bill to implement the Berne Convention.

Within the last few years, interested parties within the United States have renewed attempts to get the United States to join Berne. Congress is now seriously considering the question of adherence. Both the House and the Senate have already held hearings that explore the wisdom of the United States joining Berne at this time and the changes necessary to satisfy the obligations of Berne. Basically the central issue is the one raised in the 1985 Senate hearings. Would adherence to Berne help American creators without forcing changes in American copyright law that would wreak havoc on established principles of the American copyright system?

Since the Copyright Office has already submitted lengthy statements to both the House and the Senate that discussed the history and basic principles of Berne and summed up the arguments for and against U.S. adherence to Berne, in this statement we will focus on developments within the past few years that seem to make adherence more of a reality than at any other time in U.S. history and on a comparison of the two bills that are being considered by you today.

I. Recent Developments and the Emerging Consensus Favoring U.S. Adherence to Berne

In the past few years there has been a revival of interest in getting America to adhere to the Berne Convention for the Protection of Literary and Artistic Works. This interest has been sparked by recent events, including the U.S. withdrawal from UNESCO, the increasing importance of copyright in trade negotiations with countries that get Generalized System of Preferences (GSP) benefits and with members of the General Agreement on Tarriffs and Trade (GATT), the introduction of specific legislation in both houses of Congress, the work of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, and the Roundtable Discussions on U.S. adherence held in Geneva last fall.[1] It is perhaps of value at this point to examine briefly past U.S. efforts to adhere to Berne in light of the barriers that prevented Congress from taking the final step and to ask ourselves whether or not adherence is more viable now.

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[1] These discussions were held in Geneva on November 25 and 26, 1987. They were organized by the World Intellectual Property Organization (WIPO) at the request of the Subcommittee on Courts, Civil Liberties and the

A. Past U.S. Efforts to Join Berne

The formal adoption of the Berne Convention occurred over 100 years ago on September 9, 1886; the United States chose not to participate. Although the United States had adopted a federal copyright Act in 1790, our law did not provide any protection of foreign works until 1891.

Based on the 1891 Act the United States entered into a series of bilateral arrangements with other countries. At the beginning of the twentieth century, Berne members encouraged the United States to join. In 1909, however, the United States revised its copyright law and did not make it compatible with Berne. We continued the practice of proclaiming bilateral copyright relations with foreign countries that complied with the general requirements of U.S. copyright law, including notice, deposit, registration, and manufacture in the United States.

After World War I the foreign market for United States works began to grow. A big effort was made to revise U.S. law and make it compatible with Berne all during the 1920's and 1930's. This effort was probably doomed when the 1928 Rome Revision of Berne removed the possibility of joining Berne with reservations and added moral rights as a new obligation. The Senate came close on April 19, 1935, when it voted to ratify Berne; however, this vote was reconsidered on April 22, 1935, and the convention was put back on the Executive Calendar to await action on a bill to amend the United States copyright law.

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the Administration of Justice of the House Committee on the Judiciary. It is our understanding that a summary transcript of these discussions is being made part of the record in both the House and the Senate.

The foreign market continued to expand after World War II. It was now clear the U.S. copyright law had moved on a different path than Berne, but it was also clear that we needed better international copyright relationships. The United States led a movement to form a new international copyright convention under the auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO). The result was the Universal Copyright Convention (UCC). Representatives of the United States worked with those of other countries to establish the UCC, and the United States formally ratified the UCC on December 6, 1954.[2]

In 1976 we revised the copyright law and came closer to Berne standards without removing all of the barriers. Since that revision, the manufacturing clause has been eliminated from U.S. copyright law. As we are once again involved in a concentrated effort to adhere to Berne, U.S. copyright law has fewer barriers than ever before, and foreign markets for U.S. copyrighted works have continued to expand. The effort to join Berne may actually succeed because there is more support within the greater copyright community than at earlier times when Congress considered ratifying the Berne Convention.

B. Renewed Interest In Joining Berne

1. *Withdrawal from UNESCO*. The United States had an influential role in the development of the UCC and has been a member since 1955. In the last decade there has been some dissatisfaction with the politicizing of UNESCO, the organization within the United Nations under whose auspices the

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2. For a more detailed disuccsion, *see* Goldman, *The History of U.S.A. Copyright Law Revision from 1901 to 1954*, Copyright Law Revision Study No. 1, Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. (Comm. Print 1960) *See also id.*, Study No. 32, Bogsch, *Protection of Works of Foreign Origin* 86th Cong. 2d Session (Comm. Print 1961).

UCC was created. In 1983 growing discontent with UNESCO funding caused the United States to formally withdraw. We still belong to the UCC and actively participate at copyright meetings. We do not participate in UNESCO budgetary meetings. We are an invited guest at WIPO meetings on copyright, but do not have any direct influence since we are not a member of Berne.

2. Renewal of European Encouragement. Coincident with the 100th Anniversary of Berne, representatives of Berne and international coyright experts have encouraged the United States to join Berne. On May 16, 1985, Dr. Arpad Bogsch, the Director General of the World Intellectual Property Organization (WIPO) appeared before this subcommittee and testified on the importance of international efforts to preserve copyright. He observed that "The Berne Convention is a coalition of states determined to . . . respect . . . copyright. But the strongest potential member . . . the United States of America, is not a member . . . ." He also assured the Subcommittee that the United States would not have to change the level of copyright protection it currently provides in order to join. As Director General of WIPO, Dr. Bogsch spoke for the 76 countries that now belong to Berne and said that since they want a high level of copyright protection, they would welcome the accession of the United States as a strong ally.[3]

3. Round-table Discussions. The testimony at the 1985-1986 Senate hearings was definitely pro-Berne. U.S. reservations about whether it is necessary to change American law have generally been soothed by the responses of international copyright experts. The general international

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[3] U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong. 1st and 2d Sess. 9-12 (May 16, 1985; April 15, 1986) [Hereafter Senate Hearings on Berne].

position appears to be that there is no need for the United States to make radical changes in its law. This is definitely the position that Dr. Bogsch took before the Senate Subcommittee.[4]

At the request of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Subcommittee on the Judiciary, WIPO organized a Roundtable Discussion on United States adherence to the Berne Convention in Geneva on November 25 and 26, 1987.[5] At these discussions international copyright experts addressed four of the main issues that have concerned U.S. legislators:

(1) whether existing U.S. law is compatible with the Article 6 bis moral rights provision;

(2) whether Berne is self-executing;

(3) the extent to which U.S. formalities are a barrier; and

(4) the Berne Convention and new technologies.

Both Dr. Bogsch and other international copyright experts have emphasized that the Berne philosophy is fair and flexible enough for the convention to accommodate different legal philosophies. There are already several common law countries in Berne, including the United Kingdom, that do not appear to offer any greater protection of moral rights, for example, than that afforded under the U.S. system.

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[4] See supra at note 3.

[5] It is our understanding that a complete summary of these meetings is being made part of the record in both the House and the Senate.

There was some divided opinion as to whether the U.S. registration and deposit systems were compatible, but the prevalent opinion appears to be that both are satisfactory as long as they are not a condition of copyright.

4. GATT Considerations. For some time now the United States has been trying to get countries that do not protect U.S. works but receive benefits based on GATT's Generalized System of Preferences (GSP) to enact effective copyright measures. This is done during trade negotiations through a carrot and stick approach. Our trade negotiators now consider intellectual property protection in making decisions on GSP benefits.[6] Since the level of copyright protection that the U.S. government would like these countries to provide for U.S. works is that found in Berne, U.S. adherence to Berne would be very helpful in these negotiations.[7]

5. Leadership Role of the United States. The year 1990 will be the bicentennial of the first federal copyright act in the United States; it is possible that the next decade will see proposals to revise Berne. It seems appropriate that as this historic date nears, the United States should carefully consider the pros and cons of joining Berne now so that we can take an active role when the premier multilateral copyright convention is revised to accommodate the challenges copyright will face in the 21st century.

It is clear from the number of organizations that have come forward to testify in support of Berne that the protection of intellectual property rights including copyright is an important consideration for the

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[6] Senate Hearing on Berne at 137-139.

[7] *Id.* at 135-139, testimony of C. Michael Hathaway, Deputy General Counsel, U.S. Trade Representative.

American economy. For years the U.S. has tried to get higher Berne protection for our works through simultaneous publication in a Berne country, the so-called "back door" to Berne protection. This has seemed increasingly hypocritical to some as, in various trade copyright negotiations, we try to get other countries to give us Berne-level protection. By doing one thing and saying another, we give mixed signals to foreign governments from whom we are trying to get assurance of high level Berne protection. Undoubtedly America is one of the leading exporters of copyrighted works; active leadership in one or both of the multilateral conventions is necessary in order to ensure that these works are protected adequately.

C. Remaining Reservations about U.S. Adherence to Berne.

The usual questions about the compatibility of the Berne Convention and U.S. law, especially as to formalities and moral rights, have been fully explored in our statements at the 1985 Senate hearings[8] and the 1987 House Hearing.[9] We raised all of the arguments for and against joining Berne in these statements. Since then the manufacturing clause has expired. There is still the question of what changes would have to be made as far as moral rights, registration, and notice are concerned. Some publishers are now concerned that Article 6 bis of Berne might lead the United States to pass moral rights legislation that would disrupt their customary editing practices.

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8. See Senate Hearing on Berne, statement of Donald C. Curran, Acting Register of Copyrights, 52-114.

9. Statement of Ralph Oman, Register of Copyrights before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. (June 17, 1987).

In the past jukebox operators have expressed fear that they might have to pay more for their licenses if the United States joined Berne and the compulsory license now available was eliminated. Last week Walter Bohrer, President of the Amusement and Music Operators Association testified that his organization supports H.R. 1623.[10] This support is based on the position that the Berne Convention is irrelevant to copyright provisions pertaining to U.S. works and that the Convention is not self-executing. His organization supported H.R. 1623 since Section 8 of that bill preserves voluntary negotiations, with the license as a fallback position. Mr. Bohrer feels this not only permits the retention of the compulsory license for domestic works but also allows the United States to amend the existing compulsory license in the future.

Some of these remaining concerns were addressed at Round-table Discussions in Geneva. The next section of this statement discusses how the legislation being considered today addresses these problems.

II. Summary and Analysis of S. 1301 and S. 1971

Even though the 1976 Copyright Act eliminated most of the inconsistencies between U.S. law and the Berne Convention, United States adherence to the Convention still requires some revision of our copyright law. The heightened interest in international trade and American competitiveness has fostered a fresh look at the Convention.

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[10] Hearings on H.R. 1623; Berne Convention Implementation Act of 1988 Before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm., February 9, 1988.

S. 1301 and S. 1971 advance the inquiry into Berne adherence by offering specific solutions to most of the identified problem areas. S. 1301, sponsored by Senator Leahy, is a slightly modified version of S. 2904, introduced in the 99th Congress by Senator Mathias.[11] S. 1971, sponsored by Senator Hatch, is the Reagan administration's bill to implement the Berne Convention.[12] While broadly similar, the bills differ on a few significant points. An analysis of the specific solutions advanced by these two bills is as follows:

A. Self-execution

Both S. 1301 and S. 1971 declare that the Berne Convention is not a self-executing treaty. This means that its terms only become law through enactment of implementing legislation. Rights alledgedly established under the Convention but not recognized under U.S. law could not be maintained in U.S. courts.

In general, treaties are either "self-executing" or "executory." Treaties in the latter category require implementing legislation. In order for a treaty to be self-executing, it must contain stipulations to that effect. Implementing legislation needs to be clear on the issues of self-execution because some provisions of Berne appear sufficiently explicit to be capable of direct application. We know the Convention is applied directly in some countries. Article 30 provides that accession to Berne automatically entails acceptance of all the provisions -- both as to obligations of countries and rights of authors. Therefore, to avoid direct application by the United States courts, Congressional declarations like that in S. 1301 and S. 1971 are essential. S. 1971 would modify section 104 of title 17 by adding a provision providing "no right or interest in a work protectible under this title may be claimed under the provisions of the Berne Convention." The Copyright Office believes this addition to the Copyright Act is essential to make U.S. policy on self-execution clear. S. 1301 guards against Berne self-execution by making amendments to the Copyright Act take effect after United States adherence to Berne. The Copyright Office supports this approach as well. The clause should make the statute superior to the treaty under our Constitution since it is later in time.

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[11] 133 Cong. Rec. S. 7369 (daily ed. May 29, 1987).

[12] 133 Cong. Rec. S. 18408 (daily ed. Dec. 18, 1987).

B. No Retroactive Effect.

In the past retroactivity has clearly been a major stumbling block to United States adherence to the Berne Convention. The Senate in the 1954 ratification of the Universal Copyright Convention (which is expressly not retroactive) identified retroactivity as one of the reasons we were unable to ratify Berne.13/ Both S. 1301 and S. 1971 expressly state that works that have fallen into the public domain prior to the implementing legislation would not be protected anew.14/ The rejection of any retroactive effect is consistent with American traditions against the removal of works from the public domain. In addition, the retroactive application of the Berne Convention might raise serious constitutional concerns which, as of yet, have not been fully studied.

On its face, however, Article 18 of the Berne Convention appears to require some recapture of Berne Convention works protected in the country of origin. The Ad Hoc Committee identified five areas where recapture was

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13. Universal Copyright Convention, Report of the Senate Comm. on Foreign Relations on Executive M, S. Exec. Rep. No. 5, 83ed Cong., 2d Sess. 3 (1954).

14. S. 1301 - section 10; S. 1971 - section 2(a)(3).

arguably mandated.[15] The actual practices of Berne Convention members, however, are considerably less clear. No other country has maintained formalities as long as we have, and therefore no one has faced a retroactivity problem of the same magnitude. Comments from European experts on U.S. adherence to Berne have generally not raised retroactivity as a barrier *per se*, although some experts expect the United States will eventually grant limited retroactive protection.

C. Eligibility and Definition of Berne Union Works.

Both S. 1301 and S. 1971 would create a amend section 104 to extend eligibility to claim copyright to Berne Union members. Both proposals would add to section 101 of title 17 a definition of a "Berne Convention work." These provisions would appear to be noncontroversial and necessary in order seriously to consider Berne Convention adherence.

D. Architectural Works.

Under both S. 1301 and S. 1971, section 102 of title 17 would be amended to include "architectural works." Both proposals would add a definition of architectural works in section 101 of title 17, although S. 1301 defines the term in the plural, while S. 1971 uses the singular.[16]

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[15] Ad Hoc Working Group Report at 589-590. The five areas are as follows: (1) published works that did not meet the national eligibility requirements of the 1909 or 1976 Copyright Act upon first publication. (2) Works other than those subject to *ad interim* copyright, first published outside of the U.S. without notice prior to January 1, 1978. (3) Works first or subsequently published within the United States without notice prior to January 1, 1978. (4) Works published on or after January 1, 1978 and prior to Berne adherence, other than in compliance with the notice provisions of 17 U.S.C. Ch. 4, where such omission is not excused and can no longer be cured. (5) Works published prior to January 1, 1978, in violation of the domestic manufacturing and *ad interim* provisions of the 1909 Act.

[16] Under S. 1301 the term "architectural works" is defined as "buildings and other 3-dimensional structures of an original artistic character, and works relative to architecture, such a building plans, blueprints, designs, and models." Under S. 1971 the term "architectural work" is

Protection for architectural works would be a major change in American law. S. 1301 would limit protection to the "artistic character" of the building. This is consistent with Berne Union concepts on the subject. Yet, it is unclear how many of the total number of buildings constructed in the United States contain an "artistic character." Both S. 1301 and S. 1971 would make substantial changes in the architectural field, but the scope and nature of the change remains somewhat unclear.

Both S. 1301 and S. 1971 would create new section 119 of title 17 setting forth several limitations on the exclusive rights in architectural works. S. 1301 limits protection to a building's "artistic character and artistic design" and would not extend protection to processes or methods of construction. S. 1971 articulates this principle somewhat differently by limiting protection "to rights specified in clauses (1), (2), (3), and (5) of section 106" of title 17. Under both proposals, the owner of a building embodying an architectural work, without the consent of the author or copyright owner, would be entitled to make alterations to enhance the utility of the building. S. 1971 provides for a right of demolition, while S. 1301 makes no specific mention of such a right.

In studies on the Berne Convention, a consensus has been reached that protecting "architectural works" is a mandated obligation of the Convention. Both S. 1301 and S. 1971 meet this obligation by enumerating

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defined as "a work such as a building or other three-dimensional structure and related works such as plans, blueprints, sketches, drawings, diagrams and models relating to such building or structure." Since sections 102(a) and 119 enumerate this category of works in the plural ("architectual works"), the plural form of definition is probably preferable.

"architectural works" as a category of copyrightable subject matter in section 102. The limitations on this right by section 119 do not appear to violate mandated Berne Convention protection.

E. Moral Rights.

Both S. 1301 and S. 1971 take the position that amendment of the copyright law is not necessary concerning moral rights because alternative legal doctrines satisfy the Convention requirements. S. 1301 and S. 1971, however, approach the issue somewhat differently. S. 1301 contains no provisions specifically addressing moral rights. Section 11(c)(2) of the proposal does provide that "any right or interest in works protected under title 17, United States Code, that derives from other Federal or State law, or the common law, shall not be reduced or expanded by virtue of the provision of the Berne Convention or this Act." S. 1971, on the other hand, affirmatively states "title 17 of the United States Code does not provide an author with the right to be named as a work's author or to object to uses or changes to the work that would prejudice the author's reputation or honor."

The recognition of moral rights is probably the most controversial issue concerning adherence to the Berne Convention. Proponents of adherence invariably take the position that no change in the copyright law is necessary because sufficient protection is available under alternative legal doctrines to meet the Berne standards. Opponents of adherence argue that inevitability higher standards of moral rights protection will be incorporated into U.S. copyright law as a result of Berne adherence. S. 1301 and S. 1971 endorse the position that no change concerning moral rights would be required by U.S. adherence to Berne.

F. Jukebox Compulsory License.

Both S. 1301 and S. 1971 modify, but do not repeal, the jukebox compulsory license. The change basically allows negotiated licenses between copyright owners and jukebox owners to supercede the statutory compulsory license now in the law. In absence of agreements, however, the statutory scheme mandated in the current Copyright Act would continue.

The Berne Convention requires the owners of musical compositions to be accorded an "exclusive" right for performing by means of records. Some Berne Union countries do regulate organizations representing authors and copyright proprietors, including the setting of fees. This is usually done because of antitrust concerns. A consensus seems to be emerging that retention of the jukebox compulsory license can be justified as analogous to regulation of collective societies and, therefore, permissible under Berne.

G. Formalities.

1. Notice. Both S. 1301 and S. 1971 would eliminate the copyright notice as a condition of copyright protection, as required by the Berne Convention. S. 1301 encourages voluntary use of the notice by limiting the defense of innocent infringement in cases where a notice appears on the copy of the work. No similar provision is included in S. 1971. The Copyright Office favors the approach of S. 1301 regarding notice.

2. Registration and Recordation. S. 1301 and S. 1971 are substantially different with respect to registration and recordation. S. 1971 does not make any significant change in the registration and recordation system. Registration with the Copyright Office remains necessary before the filing of a copyright infringement suit. Likewise, recordation as a prerequisite to suit under section 205(d) remains unchanged.

S. 1301, on the other hand, eliminates registration and recordation as prerequisites to the filing of copyright infringement actions. In order to encourage registration, S. 1301 proposes new incentives by eliminating the prospect of statutory damages and attorney's fees where registration or recordation is not made within five years from publication or transfer. S. 1301 would further make the loss of statutory damages more costly by doubling the levels of statutory damages authorized by section 504 of title 17. Moreover, registration would be required for criminal enforcement of a copyright.

The Copyright Office and the Library of Congress strongly support the approach taken by S. 1971 regarding registration and recordation. The present registration and recordation requirements are procedural in nature in that they deal directly with information necessary to prosecute copyright infringement actions in federal court. They are procedural requirements that simplify and expidite litigation. The registration and recordation requirements are not conditions of securing or maintaining copyright. The Copyright Office appreciates the efforts of the supporters of S. 1301 to encourage registration through changes in statutory damages. However, whether these incentives would preserve all the benefits of the present system is uncertain. In light of the procedural requirements applied by other members of the Berne Union, the Copyright Office sees no reason to change a system that has served copyright proprietors, users, and the general public well for many years.17/

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17. Recently, a cost-benefit analysis by King Research confirmed the value of the registration system. King Research, Inc., Cost-Benefit Analysis of the U.S. Copyright Formalities iv-ix (1987). In a survey of law firms familiar with both U.S. law and foreign systems, 69% rated U.S. law superior with regard to minimum administrative burden on access to courts, while only 12% rated U.S. law as inferior. With respect to defenses against claims facilitated by record of registration

3. Mandatory Deposit. Both S. 1301 and S. 1971 retain the mandatory deposit for the Library of Congress under section 407 of title 17. The reference to publication "with notice of copyright" would be deleted by both bills. S. 1301 would increase the penalties for failure to deposit with the Library of Congress.

A deposit requirement has been an integral part of the United States copyright system for nearly 200 years.[18] In 1865 at the request of the Librarian of Congress, Ainsworth R. Spofford, the Library of Congress became the permanent beneficiary of the deposit requirement. Spofford envisioned the Library of Congress as a national library, and he saw the copyright system as a way to achieve that goal. The Copyright Acts of 1870 and 1909 had deposit requirements; failure to comply could have resulted in forfeiture of copyright.

Before 1978, deposit was tied to registration -- both were mandatory. Under the present law mandatory deposit and registration are regarded as "separate though closely related: deposit of copies or phonorecords for the Library of Congress is mandatory, but exceptions can be made for material the Library neither needs nor wants; copyright registration is not generally mandatory, but is a condition of certain remedies for copyright infringement."[19] The function of the mandatory deposit requirement, section 407 of Copyright Act, is to provide the Library of Congress with copies of works published with a notice of copyright in the United

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ownership, 64% rated U.S. law as superior, while only 16% rated it as inferior to foreign systems.

[18] See generally E. Dunne, Copyright Law Revision, Study No. 20, Deposit of of Copyrighted Works, Senate Committee on the Judiciary, 86th Cong. 2d Sess. (1960 Committee Print).

[19] H. Rep. No. 1476, 94th Cong., 2d Sess. 150 (1976).

States. The function of registration is to provide a public record concerning an applicant's claim to copyright (assuming that prima facie the claim is warranted by law). However, registration also necessarily requires a deposit of actual copies or phonorecords of the work or of appropriate identifying material. These deposits may be selected by the Library of Congress for its collections, and they represent the principal copyright law source for acquisitions by the Library.

Because noncompliance with the mandatory deposit requirement of the present law does not result in a forfeiture of any aspect of copyright protection, the present deposit system does not constitute a prohibited formality under the Berne Convention. Many Berne Union countries have some sort of deposit requirement for the enrichment of the collections of their national libraries, although not all such laws are tied to copyright.

By continuing mandatory deposit, both S. 1301 and S. 1971 recognize the importance of maintaining the living record of our society and, to a lesser extent, the culture of other countries, for present and future generations of Americans. Clearly deposit with the national library imposes a modest obligation upon copyright proprietors, particularly in comparison with the tremendous benefits proprietors receive under the copyright laws. Authors, moreover, are perhaps the greatest beneficiaries of mandatory deposit since authors are among the primary users of the Library of Congress.

The elimination of the notice formality means that the qualifying reference in section 407 to works published "with notice of copyright" must be omitted. As a result, the Library of Congress will be entitled to receive copies of all published works. In order to make section 407 effective, the Copyright Office and the Department of Justice must take enforcement action. In other Berne countries, publishers have sometimes resisted compliance with mandatory deposit laws. The West German publishers, for example, unsuccessfully sued to have their mandatory deposit law held invalid.

In order to assist in necessary compliance actions under the mandatory deposit provision, the Library of Congress requests that the congressional reports accompanying the implementing legislation clarify the following: (1) that Congress finds the mandatory deposit system to be in the public interest, and intends that the Library collections shall continue to be enriched by the copyright system, both through mandatory deposit and registration deposit; and (2) that the deposit system under section 407 as modified is constitutional in light of the tremendous benefits accorded under the copyright law to creators of published material, and that deposit, although not a condition of copyright protection, is a reasonable requirement imposed by Congress in exchange for the enormous benefits of the copyright law.

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In conclusion, after a century of soul-searching and growth, a consensus may be emerging among the affected interests in the United States and the Congress that the United States should now adhere to the Berne Convention. We appear closer than ever before to a consensus about the minimum changes in our copyright law to conform it to the obligations of Berne. The Copyright Office, without prejudging the legislative outcome, has begun internally the process of preparing for changes in copyright regulations and administrative practices. We are also preparing to offer brochures and other printed information, and to undertake an ambitious nationwide lecture tour, that will help educate the country on the changes in the law and our new obligations under the Berne Convention and the implementing legislation, if Congress passes it. The Copyright Office undertook a similar educational effect ten years ago to inform the public about the changes in United States copyright law that resulted from the major overhaul of the Copyright Act in 1976.

Our preparations are simply a matter of prudence. We will await the further deliberations by the Congress with respect to the pending bills, and, as always, the Copyright Office is at the disposal of the Subcommittee regarding any technical assistance you may request.

Senator **DeConcini**. Thank you, Mr. Oman.

Does the Senator from Iowa have any statement he'd like to put in the record at this time?

Senator **Grassley**. Yes, Mr. Chairman.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Thank you, Senator DeConcini for holding these hearings on the important issue of adherence by the United States to the Berne Copyright Treaty.

Copyright law has developed to encourage the creative process—the creators are given exclusive rights in the works they produce, works which are distributed as they are bought and sold in the economy. And copyright law has adapted well to the technological advances of the world's creative minds. From movies to sound recordings to computer software, the copyright system strives to protect the creator while allowing society to benefit from use of the creative works.

The Berne Copyright Convention is more than 100 years old, yet the United States has never formally adopted the Berne Treaty. Many key provisions of the Berne Treaty are already contained in U.S. copyright law. But several of Berne's important requirements depart from U.S. law and practice. The two issues that come to my mind are the notice requirement and the moral right section of Berne. As we consider whether the United States should become a signatory to Berne, we must carefully examine the reasons for these differences between U.S. law and Berne provisions.

I look forward to these hearings to learn more about the Berne Treaty, the reasons for the similarities and differences between Berne and current U.S. law, and the kinds of changes we would need to make in U.S. copyright law if we were to adopt Berne.

Once again, Senator DeConcini, I thank you and the witnesses who appear today.

Senator **DeConcini**. Mr. Oman, what remedies for infringement are available to a Berne country against another Berne country that are not presently available to the United States?

Mr. **Oman**. I'd like to ask Mr. Flacks to answer that question.

Senator **DeConcini**. Yes. Mr. Flacks, can you help us there?

STATEMENT OF LEWIS FLACKS

Mr. **Flacks**. Thank you.

Strictly speaking, the Convention itself doesn't address the question of minimum national remedies. No copyright convention does that. The real advantage that you get out of the Berne Convention, from the point of view of remedies, is access to remedies at national law. Very frequently we don't enjoy that access because we may not have direct copyright relations with that country or, in the event that we get so-called backdoor protection by first publication in a Berne state, something which the Convention allows——

Senator DECONCINI. Why doesn't that work?

Mr. FLACKS. It works, but historically it's proven to be speculative in that you may have to establish what exactly is a "publication." In our own law the question of what a publication is or was under the old law was something that could absorb people interested in that subject for decades, and it did. Other laws have different definitions of publication. The Berne Convention itself only recently revised its definition of publication. So backdoor publication is easy to say, but it involves a complex legal question that would vary from country to country.

Second, probably more practically, it's easy to say, but it's a difficult problem of proof. You find that you first publish a work and then, in the case of, say, a novel or a piece of music, it's infringed 10 years later. Are you going to have the records that will enable you to establish to the satisfaction of a foreign court that the work was published through this backdoor process, which is in some sense suspect anyway since you're not a member of the Union? Those problems don't exist when you claim protection on the basis of nationality.

Senator DECONCINI. Mr. Oman, regarding the issue of moral rights, would you foresee that a significant number of lawsuits might be filed claiming moral rights protection based on the fact that we might implement legislation to ratify Berne?

Mr. OMAN. Well, if the implementing legislation makes clear that there is no change in the existing law, I would not foresee any increase in the number of lawsuits filed despite the fact that the United States is a member of the Berne Convention.

We have had cases over the years that get into the area of moral rights without its being called moral rights, and those cases are important in the lore of the copyright community. I think that we probably would see a continuation of that type of suit, but there would be no increase simply because the United States adhered to the Berne Convention.

Senator DECONCINI. You have testified that you do not believe it's necessary for the United States to change the level of copyright protection that we currently provide in our domestic laws in order to comply with the requirements of the Berne Convention. Is that correct?

Mr. OMAN. As a general statement, yes.

Senator DECONCINI. Now can you cite us some examples of other countries that are Berne members that provide an equal or lesser level of protection than we do?

Mr. Oman. Well, that's one of the beauties of the Berne Convention. It does allow for a tremendous diversity. On the issue of moral rights, there are countries like France and West Germany that provide a very high level of moral rights, of course tempered very definitely with the rule-of-reason approach. There are other countries like the common-law countries—New Zealand, Australia, Great Britain—that provide a much lower or a different type of protection of moral rights. Whether one country is higher or lower really is hard to judge, but they do allow for different levels. I think that's the lesson we should draw from that.

The lesson we learned from the European experts with Mr. Kastenmeier in Geneva last November was that the United States has a very high level of protection; that we will be welcomed into the Berne Convention because of that very high level of protection; and that there were only minimal changes that were required in U.S. law.

In terms of specific examples of countries that provide different levels or lower levels or higher levels, maybe I could ask Mr. Flacks to comment briefly on that.

Mr. **Flacks**. I would be glad to provide you with greater information about that.

Senator **DeConcini**. Would you give us a couple of examples?

Mr. **Flacks**. There is no monolithic law of moral rights. These are sensitive subjects of commerce and social policy in all free countries. If you look at the statutes of Berne states, you will find some broad, some narrow, exceptions from moral rights for certain categories of users or certain broad categories of uses. You see, as well, a very rich tradition of litigation in which authors win some and authors lose some.

Senator **DeConcini**. Has a petitioner to Berne ever been expelled or rejected because of the petitioner's failure to conform its domestic laws with the provisions of Berne?

Mr. **Oman**. Countries I think have been asked to leave the Berne Convention for nonsubstantive reasons, for political reasons perhaps. There are countries that have left voluntarily. I think perhaps Indonesia left the Berne Convention shortly after independence and is now considering reentering the Berne Convention.

But one of the facts of life of the Berne Convention is that you can be a member of a different text of the Berne Convention. Some countries like Thailand are members of the 1908 Berlin text, and that provides a rather low level of protection. Most industrialized countries are members of the most recent text, and that's the text that the United States would become a member of.

Senator **DeConcini**. Thank you. I have no further questions.

Does the Senator from Iowa have any questions?

Senator **Grassley**. Yes, I do, and I will also submit additional questions.

In regard to the impact on the moral rights issue, and that which would come with the implementation of the treaty, and the potential for lawsuits therefrom, do we need to specifically freeze moral rights in the legislation in order to solve that problem? Would that be a solution?

Mr. **Oman**. Yes, sir. I think the proposed bills that we're addressing at the hearing today would not necessarily freeze moral rights, but they would state that U.S. law on the subject would not be changed, either by express language or by implication, and that courts would not go behind the language of the implementing legislation and current U.S. copyright law in deciding what the rights of authors were under the copyright laws.

Could I ask Ms. Schrader to comment further?

Ms. **Schrader**. No comment.

Senator **Grassley**. Then, it is your view that this legislation adequately addresses that potential problem?

Mr. **Oman**. Yes, sir, I think the sponsors have been very careful in making clear that there is no inadvertent expansion of U.S. copyright protection in the area of moral rights.

Senator **Grassley**. Do we need to include any language in the bill which would make sure that the writer, or any other creative person, does not sue a publisher or producer claiming that his works have been altered without his permission and then cite the Berne treaty's protection of moral rights?

Mr. Oman. I'm not so sure that the current drafts don't have adequate language to that effect. Of course——

Senator **Grassley**. You're saying they do? Or you aren't sure that they do?

Mr. **Oman**. You can always sue someone.

Senator **Grassley**. Yes.

Mr. **Oman**. There won't be any prohibition against suing, but the likelihood of prevailing would be unchanged if the implementing legislation were enacted because there's been no change in the substance of the law.

Senator **Grassley**. The bills before us are adequate in that regard?

Mr. **Oman**. Yes, sir, I think they both are explicit and provide adequate guarantees that there would be no change in the law on that question.

Senator **Grassley**. Mr. Chairman, I will submit additional questions for the other witnesses. Thank you.

Senator **DeConcini**. Very good. The record will stay open, and you can submit the questions to any of the witnesses.

[Questions and answers, subsequently submitted for the record, follow:]

The Register of Copyrights
of the
United States of America

Library of Congress
Department 100
Washington, D.C. 20540

(202) 287-8350

March 15, 1988

The Honorable
Dennis DeConcini
328 Senate Hart Office Building
Washington, D. C. 20510

Dear Senator DeConcini:

Following the public hearing February 18, 1988 on bills to amend the United States copyright law to facilitate adherence to the Berne Convention, you asked me to respond for the record to questions by Senator Grassley and Senator Hatch. I attach my response to their questions. If I can assist you in any other way, please let me know.

Sincerely,

Ralph Oman
Register of Copyrights

Responses to Senator Grassley's Questions on Adherence to the Berne Convention

1. How is U.S. law already compatible with Berne?

The Berne Convention has three general types of provisions regarding members' substantive copyright obligations: 1) rules that obligate member states to guarantee specific rights to authors and proprietors; 2) rules that establish more general obligations, leaving the details to national legislation within specified limits; and 3) optional rules whose acceptance is left entirely to national law. There is a general consensus today among those that have testified before the House and Senate Subcommittees that the United States copyright law is already in compliance with most of these obligations. Below are listed, by way of example, the general areas in which U.S. law meets the requirements of the Berne Convention.

- Article 2 of the Berne Convention establishes the type of works subject to copyright protection under the Convention. It contains an illustrative listing of such works, and establishes the subject matter of protection with reference to the creative nature of a work, not its medium of expression or any particular technology of fixation. The United States law is generally in accord with these principles, and protects all the categories of works listed in Berne in section 102; there is, however, some controversy whether the U.S. law adequately protects three-dimensional works relative to architecture.

- Articles 2(3) and (5) of the Berne Convention, concerning the protectability of compilations and derivative works, and article 2(4) concerning the nonprotectability of certain government works, correspond to the compatible provisions of sections 103 and 105 of the Copyright Act.
- Article 2(8) of the Convention contains and expressly provides an exclusion from the scope of Berne obligations copyright protection for "news of the day or ... miscellaneous facts having the character of mere items of press information." The United States law provides such an exclusion in section 102(b), which draws a line between the non-protectability of facts *per se*, as opposed to the protectability of particular original expressions of fact.
- The Berne Convention by its terms does not govern protection for works in their country of origin. However, the Convention does specify in Article 5 that formalities of a certain kind cannot be applied to works having a country of origin (generally the place of first publication) other than the country where protection is sought. The U.S. law is in compliance with the requirement that no formalities be applied to works of foreign authors seeking protection under U.S. law, with the exception of the provisions making notice of copyright a condition of the existence of the right and the requirement of renewal registration under section

304(a) for pre-1978 subsisting copyrights. All of the bills would eliminate mandatory notice, but do not change the renewal requirement since it is a transitional provision.

- The Berne Convention contains a number of articles establishing minimum terms of protection, in general and for specific works. The terms of protection afforded in chapter 3 of the U.S. Copyright Act are in compliance with these requirements, except for the provisions of section 304(a) requiring renewal registration for pre-1978 subsisting copyrights.
- Berne establishes the following minimum economic rights of authors: the exclusive right of translation; the exclusive right of reproduction; the right of public performance or recitation (which in Berne is divided basically into two broad categories -- broadcasting and nonbroadcasting public performances); the right of adaptation; and the right to record musical works. These rights are provided in section 106 of the U.S. law, which in some instances exceeds the minimum protections which Berne requires its members to afford authors.
- The Berne Convention permits certain exceptions to the exclusive rights listed above. The fair use provisions embodied in section 107 of the U.S. law are compatible

with the exceptions to exclusive rights permitted by Berne in Articles 10 and 10*bis* and other miscellaneous provisions concerning certain categories of works.

- Article 10(2) of the Berne Convention permits certain exceptions to exclusive rights in protected works that are included in publications, broadcasts, sound recordings, or audiovisual works for the purpose of teaching. Several of the limitations of the public performance right embodied in section 110 of the U.S. law would be compatible with that provision. While a number of the section 110 exemptions are unusual as compared with the practices of Berne countries, they may be compatible if the United States chooses to consider them "minor reservations" to non-broadcast public performances, which are tolerated under Berne.
- Article 11*bis* of the Berne Convention permits the application of compulsory licenses in the case of its broadcasting right; U.S. copyright experts seem to agree that United States' section 111 cable compulsory license is compatible with this provision, as is the section 118 compulsory license for public broadcasting organizations.
- Berne Article 11*bis*(3) authorizes states to legislate exemptions permitting ephemeral recordings, and this is compatible with section 112 of the U.S. law.

- Section 115 of the U.S. law, the mechanical licensing provision which creates a compulsory license for the making and distributing phonorecords of nondramatic musical works, has long been compatible with Article 13(1) of Berne.
- Section 503 of the U.S. law is compatible with Berne Article 16, regarding the seizure of infringing copies.

2.(a) What is the impact of the so called "moral rights protection in the implementation of Berne?

Moral rights traditionally have been considered to be legal rights that are included in the bundle of rights that comprise a copyright under the laws of most European countries. They are considered to be personal rights that are different from the economic and proprietary aspects of copyright.

Article 6bis of the Berne Convention sets forth some obligation for members to recognize two of the traditional moral rights: the paternity right and the right against distortion of a work (the integrity right). The paternity right is the right of an author to insist that he or she is credited as author of his or her own work, that another individual may not be credited as the author of the work, and that he or she is not credited as the author of another author's work. The right against distortion generally means that an author, even if he or she has conveyed or licensed "all rights" to the work, retains the power to prevent the distortion of the work by the transferee or licensee. Under Article 6bis these two moral rights should have the same duration as the Berne member's law provides for the economic rights of copyright, and at least some moral rights must survive the death of the author. Although the language of Article 6bis suggests that moral rights are inalienable and not waivable, the WIPO Guide to the Berne Convention indicates that this strict construction is not necessary.

The United States clearly must protect these moral rights at some level if it adheres to Berne. Various parties have differing views as to the level of moral rights protection U.S. law does, or should, provide. The Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention studied the moral rights provisions in the national laws of Berne members and found that there exists a lack of uniformity in protection of moral rights in Berne nations. For example, while most Berne members grant the right to claim authorship (the paternity right) in their copyright legislation, Australia, Ireland, Liechtenstein, and South Africa do not. The United Kingdom's law provides for only the author's right to prevent his name being affixed to the work of another author, and the Swiss law gives the protection of the moral rights outlined in Article 6bis only to Swiss authors. With respect to the right of integrity, Berne members give widely varying recognition to Article 6bis. Some members offer no protection of the right of integrity at all, while others, such as West Germany, outline detailed provisions in this area. The same lack of uniformity applies to Berne members' treatment on the issues of duration and transferability of moral rights.

Because of the lack of uniformity in the level of protection of moral rights offered by other Berne nations, the absence of moral rights provisions in some of their laws, Berne's reservation of control to each country over the remedies to enforce their moral rights provisions, and the fact that the United States federal trademark law and the common law and statutory provisions available in state courts offer some moral rights protection, the Ad Hoc Working Group and the Copyright Office have concluded individually that Berne implementing legislation need not affect the present law in the United States concerning moral rights. Accordingly, the impact of the issue of moral rights protection in the United States should be to stimulate debate and interest in possible moral rights legislation in the future, but need not impede our timely accession to the Berne Convention.

2.(b) Do we need to specifically freeze moral rights?

Proponents of an amendment to S. 1971 to freeze the status of moral rights under the present law in the United States maintain that the act of ratification of the Berne Convention in and of itself could give courts and state legislatures a legal basis, or incentive to expand moral rights, notwithstanding language in the implementing legislation stating that the specific provisions in the Convention (including Article 6*bis*) are not self-executing. Accordingly, these parties deem it important or necessary to provide in the implementing legislation that there is a real difference between moral rights under Article 6*bis* of Berne and those rights that exist under federal or state statutes or judicial construction that are the "equivalent" to moral rights under Article 6*bis*. In addition, they feel the legislation should explicitly state that no moral rights are created by the act of U.S. accession to Berne, and should provide that the now-existing rights that are the "equivalent" to moral rights may not after the effective date of the implementing legislation be expanded by "Federal or

State statute or by judicial construction," except with respect to an individual State's authority to afford authors rights available in other states.

Opponents to such an amendment point out that a provision in the implementing legislation clarifying Congress' intent that the Convention is not self-executing is all that is necessary to signal to courts and State governments that Congress does not intend for accession to Berne to lead to the expansion of now-existing moral rights or the addition of new moral rights under various legal theories. Some of these opponents do not desire the adoption under the U.S. copyright law of specific moral rights provisions. However, nor would they attempt to interfere with the natural development of the law interpreting the Lanham Act, common law theories of libel, publicity, privacy and unfair competition, contract theories, and state legislation in the area of moral rights, since federal statutory copyright law has historically never attempted to preempt the development of state (and federal Lanham Act) law development in these areas. The Copyright Office finds it difficult to disagree with this point of view.

3. How does U.S. law already provide the minimum level of protection for these "moral rights" which is required by Berne?

Most American courts have rejected the moral rights doctrine as a specific concept by that name. However, American law does recognize rights that are analogous to some of the authors' perogatives of the moral rights doctrine through the application of a variety of noncopyright state statutes, judicial decisions interpreting state common law, and possibly the federal trademark law.

Of the three categories of paternity right recognized under the moral rights doctrine, two are well protected in the United States. The right of an author to prevent others from taking credit for his or her work has been upheld in suits based upon either unfair competition or contract theories. Factors such as lost sales and damage to business reputation have been the bases for damage awards. It is also possible that this failure to credit an author properly constitutes "reverse passing off" under section 43(a) of the Lanham Act and common law trademark law, or, if the copyright in the work at issue has been infringed, libel.

Likewise, several judicial decisions have sustained an author's right not to be falsely named as the creator of someone else's work. Courts have rested this right against false attribution upon several different theories. The classical concept of unfair competition has been applied on the theory that the work of another is being passed off as the author's own work. False attribution has also been found to constitute a false description or representation in violation of section 43(a) of the Lanham Act. Finally, violation of an author's right against false attribution has been held wrongful under tort theories of libel and invasion of privacy. In some such cases, even damages for mental anguish have been awarded.

There is no judicially recognized right of integrity in the United States, and the Copyright Act does not grant a general moral right to prevent distortion, mutilation, or other modification of a work, independent of the copyright itself. Under section 106(2) of the Act, the owner of the copyright can prevent anyone from making a derivative work without his consent. If an author's assignment or license agreement concerning a particular work is silent with respect to the right to make changes in the work, case law holds that unauthorized changes in the work which are so extensive as to impair the integrity of the original work constitute copyright infringement. In addition to a copyright claim, an author whose assignee or licensee has made such unauthorized changes in his work would have a cause of action under the Lanham Act, because the presentation of a mutilated work, accompanied by the author's name, violates section 43(a).

Some decisions have offered authors protection against mutilation, distortion, or other modifications based upon a claim of libel; others have suggested in dicta that publication of a work with unauthorized changes, under the author's name, may violate his or her right of privacy or publicity. And, in instances in which an assignee or licensee is contractually obligated to mention the name of the author in connection with the presentation of his work, several courts have held that such an obligation carries the implied duty not to make such changes in the works as would render the "credit" a false attribution of authorship.

Answers to Senator Hatch's Questions on Adherence to the Berne Convention S. 1301 and S. 1971

1. **You have undoubtedly heard the concern of some publishers and broadcasters about moral rights. They fear moral rights could disrupt their customary editing practices and work for hire relationships. Would their fears be justified if the full French system of rights of paternity and integrity were implemented in the United States?**

Those individuals that have testified before the House and Senate Subcommittees that the moral rights provisions of Article 6bis of the Berne Convention would, if adopted in this country, disrupt their customary business practices seem to fear the effects of the right of integrity, and not the right of paternity. They fear that photographers or writers who do not have an opportunity to review the editing of their works before the works are published will under Berne acquire the injunctive power to stop the press or, after publication, sue for damages, if they characterize the editing as a "mutilation" or "distortion" of their work. Their fears are augmented by the knowledge that "Americans are a litigious people."

The Copyright Office would not deny that United States accession to the Berne Convention may well give rise to litigation based upon an author's claim to moral rights under an interpretation of Article 6bis of the Convention. However, the fears of publishers and others that such litigation will drastically disrupt the copyright industries' way of doing business is speculative at best, and may well underestimate the federal and state judiciary. The courts would have several reasons to continue to interpret the law in a manner consistent with the way it was interpreted prior to Berne adherence. First, the courts would be bound to give legal construction to Congress' intent that the Convention, including Article

6*bis*, is not self-executing. Second, even if the courts choose to look deeper into the meaning of the moral rights doctrine as it is interpreted by Berne nations, they would find no consistent treatment of moral rights, and would most likely continue to apply theories of tort, contract and Lanham Act law, for lack of Congressional guidance. Third, on the basis of the present body of moral rights "equivalent" cases, liability is found only when the defendant's action exceeded the normal bounds of propriety; thus, publishers, for example, need not fear that customary editing of the works of writer and photographer contributors would be construed as "mutilation" actionable under state or federal law merely because the United States has joined the Berne Union.

2.(a) What protections can be built into implementing legislation to ensure that these disruptions caused by moral rights do not occur?

In analyzing moral rights issues it is important to remember that one party's "disruption" is another party's violation of a fundamental right. Assuming U.S. adherence to Berne goes forward without moral rights being incorporated into the copyright law, then adherence must be rationalized on the basis of moral rights protection being available under alternative state remedies and the Lanham Act. Accepting the theory that moral rights are available under alternative legal doctrines necessarily restricts the discretion one has in limiting the application of those remedies.

The theory that sufficient protection of moral rights already exists under alternative legal doctrines does not rest on a great number of cases. What state law cases exist rest on contract law, libel, invasion of privacy, right of publicity, and misappropriation. In deciding the cases which have arisen, a significant factor has been whether the defendant's action is seen as consistent with customary practice in the area. In general, only where the defendant's action exceeded normal bounds of propriety has liability been imposed. Therefore, on the basis of the present body of cases, the "customary" practices should not be radically altered by adherence to Berne.

2.(b) Do you think it helps to specifically state that implementing legislation does not create, expand or diminish any moral right?

Clearly those objecting to Berne on the basis of moral rights protection would be more comfortable with implementing legislation that attempts to freeze moral rights protection at the level of existing law. In political terms, if such an approach helped achieve political consensus, then it might be useful for that purpose.

In practical terms, several problems exist with "freezing" the law on moral rights. One is the lack of cases precisely determining the nature of protection that would be frozen. Most states have no cases dealing with any aspect of moral rights under any theory. In such a state, what would be the significance of a provision in title 17 freezing the law on moral rights? Since all moral rights issues under state law are argued under alternative legal doctrines, why would a state judge consider himself or herself bound by the federal copyright law?

Other problems arise with regard to preempting the authority of state legislatures from enacting moral rights legislation. Moral rights legislation could be classified under alternative legal theories thereby possibly avoiding preemption by the federal copyright law. Preemption could also be avoided by characterizing the legislation as clarifying existing law, rather than creating new rights. Finally, any attempt to preempt state legislatures from enacting laws in the field would cause friction between federal and state authorities.

3. How would you respond to the publishers' concerns that courts or state legislatures might take the additional step of implementing moral rights, even if Congress does not create moral rights by law?

Regardless of whether the United States adheres to Berne or not, courts or state legislatures could advance moral rights on their on initiative. Three states already have statutes protecting the moral rights of visual artists.

For proponents of moral rights protection, accession to the Berne Convention would be cited as a factor favoring enactment when pressing for moral rights legislation before state legislatures. In arguing a close case in a state court, the practices of Berne members could possibly be cited as evidence of "customary" practice. However, since all state actions would have to be based on an alternative theory other than copyright, many other factors would be relevant in such a case.

4. Legislation has been introduced to reenact the manufacturing clause. If the manufacturing clause, which has expired, were reenacted, what would that mean for United States compliance with Berne?

If a manufacturing clause were reenacted similar to the clause contained in the 1976 Copyright Act, it would violate the Berne Convention. Under the Berne Convention, works of American nationals first published in Berne Convention countries must be protected without restrictive formalities that affect the existence of one or more of the exclusive rights. The expired manufacturing clause would violate this provision.

5. **S. 1301, the Leahy Bill, and S. 1971 are very similar. In one respect, however, they differ. S. 1971 retains the current registration requirements of U.S. copyright law. S. 1301 would eliminate mandatory registration, though it contains some provisions encouraging voluntary registration. Which approach do you prefer and why?**

The Copyright Office strongly endorses the approach of S. 1971. The registration provisions as they now exist are fully compatible with Berne. Registration is not a mandatory condition of the existence of the right. Copyright protection in a work exists independently of registration with the Copyright Office. The requirement that copyright claimants seek registration before the filing of a copyright infringement action is procedural in nature. If registration is denied, the copyright owner has the statutory right under 17 U.S.C. §411(a) to bring an action directly against an alleged infringer. The copyright owner is not denied relief; the right can be enforced. Therefore, section 411(a) is not prohibited by Berne; it is not a condition of the "enjoyment or exercise" of the copyright as understood by the members of the Berne Union. That reasonable "procedural" requirements such as section 411(a) are permitted by Berne is amply supported by the definitive World Intellectual Property Organization (WIPO) Guide to the Berne Convention. See the discussion of Article 5(2), at page 33:

> "The word 'formality' must be understood in the sense of a condition which is necessary for the right to exist -- administrative obligations laid down by national laws, which, if not fulfilled, lead to loss of copyright."

All Berne member nations maintain some procedural requirements for the enforcement of copyright. Some Berne countries maintain registration systems in keeping with their unique national experience, setting their own inducements to encourage registration. For example, the registration systems of Argentina, Chile, and Uruguay are mandatory in certain respects, and Chile has adopted a two-tier approach to exempt foreign works from mandatory registration.

Countries not maintaining a registration system nevertheless impose judicial procedural requirements. In given cases, these procedural requirements may be arduous. It is interesting to note that private practitioners recently confirmed the value of the U.S. registration system in the King study commissioned by the Copyright Office. In a survey of law firms familiar with both U.S. law and foreign systems, 69% rated the U.S. system superior with regard to minimum administrative burden on access to courts. Only 12% rated U.S. law as inferior. With respect to defenses against claims facilitated by record of registration ownership, 64% rated U.S. law as superior, while only 16% rated it as inferior to foreign systems.

Some of the benefits of the copyright registration-recordation system in the litigation context include the following:

- the certificate simplifies proof of the facts of the case;
- the certificate constitutes prima facie proof of copyright validity, thereby easing the burden of copyright claimants in proving their cases;
- prior examination by the Copyright Office (application of Examiner expertise and creation of correspondence records) assists the courts in resolving complex legal issues and in narrowing the points of controversy; and
- deposit copies and identifying materials serve to identify the precise work in which copyright is claimed.

All proposals to implement the Berne Convention purport to take a minimalist approach whereby no change in U.S. law is made unless absolutely necessary. Under a minimalist approach, the position of S. 1791 on registration should be adopted. In testimony before the House Subcommittee, Berne expert Robert Dittrich of Austria said no change in the registration provisions is necessary. Professor Paul Goldstein of Stanford also confirms this position. The opinions of respected copyright experts such as Robert Dittrich and Paul Goldstein and the WIPO Guide commentary constitute ample support for the Copyright Office's position that section 411(a) of the Copyright Act is consistent with Berne.

Copyright proprietors say they favor a strong United States registration system, that they will continue to register, and that the copyright registration system will not be diminished by the change in the law. However, the long-term effects of eliminating registration as a condition of suit are, at best, uncertain. Any change in the incentives to register will likely result in the loss of some registrations.

In any case, the change is not in the public interest. If registration is not a prerequisite to suit, American (and foreign) plaintiffs can by-pass the Copyright Office and its screening process especially in the hard cases where the Office is likely to refuse registration. The courts will be asked to rule on an increased number of novel issues, without benefit of an administrative record to expedite their proceedings. Copyright owners with questionable claims will seek to enforce rights by asking the courts -- often in the context of a short-fused temporary restraining order or a preliminary injunction -- to rule directly on their claims, without risking the negative implications that would arise from a possible Copyright Office denial of registration.

Attorneys with weak cases or novel cases would have a powerful incentive to by-pass the Copyright Office in precisely the kind of case in which the courts would want to have the advice of an expert agency.

The contention that foreigners might retaliate is not well-founded. If the foreign country does not have a registration system, it could only create one if it imposed at least the same conditions on its own nationals. If, like some Berne countries, it already has a registration system, it will not change that system simply because the United States chooses a different set of incentives to underpin its registration system.

Our registration system, including the requirement that the copyright owner attempt registration before filing an infringement action, is in the public interest and is compatible with the obligations of the Berne Convention. In the unlikely event that another country seeks to justify onerous, unreasonable, or otherwise Berne-incompatible requirements on the specious basis of a comparison to our registration system, the United States can, in addition to pointing out the differences, invoke trade leverage and/or moral persuasion to dissuade the country from imposing unreasonable requirements. Our system is quite the opposite: it is fair, promotes judicial economy, and serves the interests of the public -- both copyright users and copyright owners.

The Register of Copyrights
of the
United States of America

Library of Congress
Department 100
Washington, D.C. 20540

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March 15, 1988

The Honorable
Dennis DeConcini
328 Senate Hart Office Building
Washington, D. C. 20510

Dear Senator DeConcini:

I write in response to your letter of March 8, 1988, requesting answers to questions submitted by Senator Helfin for inclusion in the record of the February 18, 1988 hearing on copyright legislation to facilitate United States adherence to the Berne Convention.

Question 1. **In Representative Kastenmeier's testimony, he indicated that we may not need to alter our current law with respect to architectural works. Would you comment on this?**

Answer:

I share Representative Kastenmeier's concern that we have not heard from all segments of the public affected by specific inclusion of works of architecture within the copyright law. The record has not been sufficiently developed for the Congress to make judgments about the scope of protection and the need for limitations on any rights in architectural works. Under these circumstances, it is better not to change existing law. We now protect architectural plans against copying. While we do not protect the structural or functional aspects of buildings, copyright can protect the separate artistic features, if any, that are independent of the utilitarian aspects of any useful article, including a building. Also, we can rely on existing state law remedies, in the nature of breach of contract or unfair competition, for example, to accord protection for architectural works, similar to the way in which the Senate bills rely on state law remedies to satisfy the moral rights obligations of the Berne Convention.

Question 2. In those countries that protect the "artistic character and design" of a building, how do they differentiate between the artistic character and design and the functional or utilitarian aspects of the architecture?

Answer:

The Copyright Office has little information about the experience of Berne member countries in protecting works of architecture. We know, however, that many countries apply a standard of "artistic character" to distinguish protected from unprotected designs when applied to utilitarian objects. Courts in those countries apply a qualitative standard that requires original, artistic effort in the creation of aesthetic design features. However, design features of buildings responsive primarily to engineering, structural, or other functional considerations would generally not be protected.

I trust this is responsive to your questions. If I can be of any further assistance, please let me know.

Sincerely,

Ralph Oman
Register of Copyrights

U c

The Register of Copyrights
of the
United States of America

Library of Congress
Department 100
Washington, D.C. 20540

(202) 287-8350

March 31, 1988

The Honorable
Dennis DeConcini
328 Senate Hart Office Building
Washington, D. C. 20510

Dear Senator DeConcini:

I attach the responses of the Copyright Office to additional written questions from Senator Leahy in connection with the hearing on S. 1301 and S. 1971. The questions were received after I responded to your letter of March 8, 1988.

Sincerely,

Ralph Oman
Register of Copyrights

Question 1:

> The Copyright Office has been actively involved in providing technical assistance to countries that want to upgrade their copyright laws. For example, the People's Republic of China is moving toward the enactment of a copyright law for the first time.
>
> Are these countries, including China, revising or establishing their copyright laws with an eye toward Berne standards? Is it likely that some of these developing and newly industrialized countries will seek to join the Berne Convention in the near future?
>
> Do you think that U.S. adherence to Berne would be helpful for the success of our efforts to encourage developing and newly industrialized countries to strengthen their copyright laws?

Answer:

One of the major benefits of joining Berne envisioned for the United States is the probable salutary effect that U.S. adherence would have on countries, like China, who have not yet adhered to Berne. The United States is hopeful that the People's Republic of China will take account of Berne standards in promulgating a copyright law. Various Chinese copyright officials have visited the United States to study the copyright administration system of the United States. China may complete and enact its copyright law in 1988 or 1989. Thereafter it will be looking into membership in one or more of the international conventions. Since China is studying the U.S. model closely, our adherence would undoubtedly have a favorable impact on its decision. The U.S. Trade Representative, Mr. Yeutter, recently testified that the United States would be able to negotiate more aggressively with developing and newly industrialized countries once the U.S. adheres to the Berne Convention.

The Copyright Office is additionally stepping up its efforts to provide technical assistance to foreign countries in copyright. The United States will be accepting through the WIPO internship program foreign officials for training in, and studying of, U.S. copyright law. We also hope to institute a United States national copyright symposium for developing countries in 1989.

The United States hopes to show by educational programs and by good example that "front door" protection under Berne is the route to higher level international copyright protection. U.S. adherence to Berne should improve our leverage in Berne member states and should have a positive effect on copyright and trade negotiations in general.

Question 2:

> **Authorities including the State Department's Ad Hoc Committee of experts and Chairman Kastenmeier have indicated that we do not need to change our law on moral rights in order to meet the moral rights requirements provided in Berne. Could you describe some of the remedies available under federal, state and common law that protect the interests of creators addressed by Article 6*bis* of Berne?**

Moral rights traditionally have been considered to be legal rights that are included in the bundle of rights that comprise a copyright under the laws of most European countries. They are considered to be personal rights that are different from the economic and proprietary aspects of copyright.

Article 6*bis* of the Berne Convention sets forth some obligation for members to recognize two of the traditional moral rights: the paternity right and the right against distortion of a work (the integrity right). The paternity right is the right of an author to insist that he or she is credited as author of his or her own work, that another individual may not be credited as the author of the work, and that he or she is not credited as the author of another author's work. The right against distortion generally means that an author, even if he or she has conveyed or licensed "all rights" to the work, retains the power to prevent the distortion of the work by the transferee or licensee. Under Article 6*bis* these two moral rights should have the same duration as the Berne member's law provides for the economic rights of copyright, and at least some moral rights must survive the death of the author. Although the language of Article 6*bis* suggests that moral rights are inalienable and not waivable, the WIPO *Guide to the Berne Convention* indicates that this strict construction is not necessary.

Most American courts have rejected the moral rights doctrine as a specific concept by that name. However, American law does recognize rights that are analogous to some of the authors' prerogatives of the moral rights doctrine through the application of a variety of noncopyright state statutes, judicial decisions interpreting state common law, and possibly the federal trademark law.

Of the three categories of paternity right recognized under the moral rights doctrine, two are well protected in the United States. The right of an author to prevent others from taking credit for his or her work has been upheld in suits based upon either unfair competition or contract theories. Factors such as lost sales and damage to business reputation have been the bases for damage awards. It is also possible that this failure to credit an author properly constitutes "reverse passing off" under section 43(a) of the Lanham Act and common law trademark law.

Furthermore, if the copyright in the work at issue has been infringed and the infringing work states that it is a unique work, an action for libel may be sustained.

Likewise, several judicial decisions have sustained an author's right not to be falsely named as the creator of someone else's work. Courts have rested this right against false attribution upon several different theories. The classical concept of unfair competition has been applied on the theory that the work of another is being passed off as the author's own work. False attribution has also been found to constitute a false description or representation in violation of section 43(a) of the Lanham Act. Finally, violation of an author's right against false attribution has been held wrongful under tort theories of libel and invasion of privacy. In some such cases, even damages for mental anguish have been awarded.

There is no judicially recognized right of integrity in the United States, and the Copyright Act does not grant a general moral right to prevent distortion, mutilation, or other modification of a work, independent of the copyright itself. Under section 106(2) of the Act, the owner of the copyright can prevent anyone from making a derivative work without his consent. If an author's assignment or license agreement concerning a particular work is silent with respect to the right to make changes in the work, case law holds that unauthorized changes in the work which are so extensive as to impair the integrity of the original work constitute copyright infringement. In addition to a copyright claim, an author whose assignee or licensee has made such unauthorized changes in his work would have a cause of action under the Lanham Act, because the presentation of a mutilated work, accompanied by the author's name, violates section 43(a).

Some decisions have offered authors protection against mutilation, distortion, or other modifications based upon a claim of libel; others have suggested in dicta that publication of a work with unauthorized changes, under the author's name, may violate his or her right of privacy or publicity. And, in instances in which an assignee or licensee is contractually obligated to mention the name of the author in connection with the presentation of his work, several courts have held that such an obligation carries the implied duty not to make such changes in the work as would render the "credit" a false attribution of authorship.

Question 3:

> **Please explain why, in the Copyright Office's view, section 411(a) does not impermissibly make the enjoyment and exercise of an essential right of the copyright holder subject to a formality, from the standpoint of the Berne Convention. If a work is not registered with the Copyright Office, what rights is an author or other copyright proprietor able to "enjoy and exercise" under current U.S. law?**

Answer:

Under the 1976 Copyright Act, registration is not a mandatory condition of the existence of copyright. Copyright protection in a work exists independently of registration with the Copyright Office. The requirement that copyright claimants seek registration before the filing of a copyright infringement action is procedural in nature. If registration is denied, the copyright owner has the statutory right under 17 U.S.C. §411(a) to bring an action directly against an alleged infringer. The copyright owner is not denied relief; the right can be enforced.

Therefore, section 411(a) is not prohibited by Berne; it is not a condition of the "enjoyment or exercise" of the copyright as understood by the members of the Berne Union. That reasonable "procedural" requirements such as section 411(a) are permitted by Berne is amply supported by the definitive *World Intellectual Organization (WIPO) Guide to the Berne Convention*. *See* the discussion of Article 5(2), at page 33:

> "The word 'formality' must be understood in the sense of a condition which is necessary for the right to exist -- administrative obligations laid down by national law, which, if not fulfilled, lead to loss of copyright."

All Berne member nations maintain some procedural requirements for the enforcement of copyright. Some Berne countries maintain registration systems in keeping with their unique national experience, setting their own inducements to encourage registration.

Countries not maintaining a registration system of any type may nevertheless impose judicial procedural requirements. In given cases, these procedural requirements may be substantial. It is interesting to note that private practitioners recently confirmed the value of the U.S. registration system in the King cost-benefit study. In a survey of law firms familiar with both U.S. law and foreign systems, 69% rated the U.S. system superior with regard to minimum administrative burden on access to courts. Only 12% rated U.S. law as inferior. With respect to defenses against claims facilitated by record of registration ownership, 64% rated U.S. law as superior, while only 16% rated it as inferior to foreign systems.

The last sentence of question 3 asks the following: "if a work is not registered with the Copyright Office, what rights is an author or other copyright proprietor able to 'enjoy and exercise' under current U.S. law?" The answer is: the author or proprietor enjoys all rights under the Act and can exercise those rights against an infringer in court, whether registration is granted or denied. The registration requirement is merely procedural -- registration must be attempted before filing an infringement action, but it does not bar the courthouse door.

Question 4:

> **In your view, is a member of the Berne Union free to impose whatever restrictions it wishes on the right of a copyright holder to seek redress, enjoin, or be compensated for infringement? For example, if registration as a prerequisite to suit is compatible with Berne, does the Convention impose any limitations on the amount of the fee imposed to register a work, or the number of copies of the work that must be given to the registering authority? In your view, would a requirement that the work be translated into the language or dialect of the situs of the court or other enforcement authority, as a prerequisite to enforcement, violate the Berne Convention? If, in your view, the Berne Convention standards would limit the discretion of a member state in imposing such prerequisites, please identify the provision of the Berne Convention which is the source of these limitations, and explain why this provision is not offended by section 411(a) of the current U.S. copyright law.**

Answer:

The general intent of the Berne Convention is to foster a high level of copyright protection. Despite this broad purpose, specific enforcement remedies are largely left for determination by domestic law. This is clear from a complete reading of Article 5(2) concerning formalities:

> (2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protection his rights, shall be governed exclusively by the laws of the country where protection is claimed. (Emphasis added.)

The provision prohibiting formalities with respect to the enjoyment and exercise of copyright has generally been construed to prohibit formalities with respect to the creation or continued existence of the right. The extent of protection and means of redress, is left exclusively to domestic law unless covered by an article other than Article 5. With the exception of Articles 15 and 16, the Convention is silent as to enforcement issues. Article 15 sets forth standards regarding standing to sue, and Article 16 authorizes seizure of infringing copies.

The primary mechanism for discouraging discriminatory treatment of foreign claimants is the principle of national treatment. It is clear that whatever standards are imposed on foreign nationals must also be imposed on domestic works. The principle of national treatment has eliminated many of the abuses that flourished before the creation of multilateral copyright conventions.

Answers to the specific questions raised above are as follows: "In your view, is a member of the Berne Union free to impose whatever restrictions it wishes on the right of a copyright holder to seek redress, enjoin, or be compensated for infringements?" Under Article 15, if an author's name appears on the work, absent proof to the contrary, he or she automatically becomes entitled to institute infringement proceedings. Article 15, however, does not suspend procedural requirements governing the enforcement of copyright. Under Article 16, adhering nations are obligated to establish seizure remedies with respect to infringing copies. All other issues relating to "means of redress" are determined exclusively by domestic law by virtue of Article 5(2).

"For example, if registration as a prerequisite to suit is compatible with Berne, does the Convention impose any limitations on the amount of the fee imposed to register a work, or the number of copies of the work that must be given to the registering authority?" No provision in the Convention sets limits in this area except national treatment. Whatever requirements are imposed on works covered by the Berne Convention must similarly be applied to domestic works. Some commentators may argue for a standard of reasonableness with respect to fees, deposit copies, etc., and countries may apply moral persuasion or whatever leverage exists to dissuade members from applying onerous procedural requirements.

"In your view, would a requirement that the work be translated into the language or dialect of the situs of the court or other enforcement authority, as a prerequisite to enforcement, violate the Berne Convention?" There is no provision in the Berne Convention that prohibits such a requirement. In general, the purpose of international conventions is to achieve agreement on broad principles. Countries are generally unwilling to bind themselves to specific enforcement procedures and/or remedies in the text of international conventions. As a result, Article 5(2) explicitly states that "the means of redress" is to be exclusively governed by domestic law.

Examples of procedures deemed acceptable under international standards may be derived from a study of the Hague Convention governing service of process, one of numerous procedures that must be followed to file any lawsuit. Under this Convention, West Germany only permits service to be made through the West German Ministry of Justice. A total of four copies of the complaint must be forwarded - two in English, two in German. These rather arduous requirements have been ruled valid under the provisions of that Convention. See, Rivers v. Stihl, 434 So.2d 766 (Ala. S.Ct. 1983).

"If, in your view, the Berne Convention standards would limit the discretion of a member state in imposing such prerequisites, please identify the provision of the Berne Convention which is the source of these limitations, and explain why this provision is not offended by section 411(a) of current U.S. copyright law." The examples cited in this question 4 are substantially more onerous than the permissive registration system maintained in the United States. Yet none of the examples are specifically prohibited by the Convention. Article 5(2) plainly leaves the "means of redress" to domestic law. The impediment to establishing arbitrary procedures designed to thwart foreign claimants is the principle of national treatment. Whatever standards are applied to foreign claimants must likewise be imposed on domestic claimants. The Berne Convention makes no attempt to establish a uniform system of enforcement remedies. The principle of national treatment, coupled with the obligatory standards established by numerous provisions throughout the Convention, have succeeded in fostering a high level of protection, as well as an absolute minimum of procedural burdens, including reasonable filing fees.

Question 5:

In 1985, the Director General of the World Intellectual Property Organization testified before this subcommittee as follows:

> The only real difference ... that makes U.S. law incompatible with the Berne Convention consists in the notice and registration requirements. One can solve that in two ways make compliance with these two requirements voluntary rather than mandatory for any work, or make compliance with those requirements voluntary only for foreign works that would have to be protected under the Berne Convention.
>
> I am convinced that even if the former course is chosen, the flow of free copies of works to the Library of Congress will continue, and the number of registrations in the Copyright Office will continue, so that no one will lose his or her job there because of the advantages that deposit and registration have even without being conditions of copyright protection.
>
> And if the second course is chosen ... my prediction is even more likely to be correct since foreign works that would come under the Berne Convention only represent a small fraction, I am told some 5 percent, of the total deposits and registrations in the Copyright Office.

Please comment on Dr. Bogsch's testimony. Specifically, please state your reasons for disagreeing with his conclusion that current law on notice and registration is incompatible with Berne. Also, please provide the best available estimate of the percentage of works registered by the Copyright Office which originate in Berne countries (i.e., which are "Berne Convention works" within the meaning of the pending legislation).

Answer:

Notwithstanding his initial comments to the subcommittee in 1985, Dr. Bogsch now agrees with the position of the Copyright Office that no change in section 411(a) is necessary to make U.S. law compatible with Berne. At the time of his 1985 testimony, Dr. Bogsch did harbor some reservations about the permissive nature of our registration system. He was also of the opinion that the jukebox compulsory licensing system had to be eliminated in its entirety. Since Dr. Bogsch's initial testimony, further study has resolved many of the issues which were thought to be potential problems, including registration, and a general consensus has emerged that the United States should follow a minimalist approach to Berne implementing legislation. In December 1986, Dr. Bogsch wrote the Register of Copyrights confirming his agreement with the position of the Copyright Office on registration. In that letter he stated:

> "I like your minimalist approach. I think that all three legs of the three-legged stool could stay as they are."

The reference to "three legs" means registration is induced by three methods: by conditioning the presumption of copyright validity on it, by conditioning statutory damages on it, and by requiring the claimant to seek registration as a prerequisite to an infringement suit. The percentage of Berne Union works registered by the Copyright Office cannot be precisely determined. Since implementation of the 1976 Copyright Act in 1978, the Copyright Office has not distinguished between registered domestic works and registered foreign works. Therefore, no precise figures can be given in response to this question.

Moreover, under the former copyright law, only published works were separately tabulated, and the category "Berne Convention work" would not be co-extensive with "foreign work" pre-1978. Our best rough estimate of "Berne Convention" works would be 5% of the 600,000 annual registrations.

The exact percentage is far less significant to the Library of Congress than the fact that these foreign works, which are made available for accession through copyright registration, are qualitatively extremely important acquisitions. Mandatory deposit cannot be used to acquire foreign works unless they are republished in the U.S. Even then, the claiming procedures of mandatory deposit are cumbersome and expensive, especially as applied to reluctant foreign publishers.

Question 6:

> **Please summarize the available evidence, from the King Research study or other sources, which suggests that the provisions of section 411(a), as distinct from other statutory incentives to registration, stimulate copyright owners to register works which they would not register if section 411(a) were repealed. If section 411(a) were repealed, please describe the anticipated impact on the volume of registrations, including the types of works now being registered that you predict would no longer be registered. Please explain the basis for your predictions.**

Answer:

There is no way to estimate the long-term effects of eliminating registration as a condition of suit. The incentives to register are, in essence, a bundle. The removal of one incentive will likely result in the loss of some registrations. There is no way accurately to predict, however, the proportion of copyright proprietors who would decide to forego registration. The King study analyzed the registration issues in terms of the bundle of rights. Neither King nor any other study has made an effort to gauge the consequences of eliminating one of the incentives.

While the percentage of lost registrations is impossible to estimate, some of the consequences of eliminating the section 411(a) incentive are predictable. Clearly anyone anticipating a rejection of a claim will opt to bypass the registration system of the Copyright Office. The percentage of such instances may not be great but their impact on the courts and copyright jurisprudence will be major. Much copyright litigation involves novel issues. Where liability is clear the case is usually settled, often before a case is even filed. Cases raising fundamental issues of copyrightability are major underpinnings of copyright jurisprudence. More often than not the registration practices of the Copyright Office play an important role in such cases. A few landmark examples would include: Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903) (copyrightability of circus posters); Mazer v. Stein, 3487 U.S. 201 (1954) (copyrightability of works of art incorporated in useful articles); Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (noncopyrightability of a five-pointed star); Eltra v. Ringer, 579 F.2d 294 (4th Cir. 1978) (noncopyrightability of a type face design); Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) (noncopyrightability of a lighting fixture lacking separable artistic authorship); Norris Industries, Inc. v. International Telephone and Telegraph Corp., 696 F.2d 918 (11th Cir. 1983) (noncopyrightability of a wire-wheel hub cap); Williams Electronics Inc. v. Artic International Inc., 685 F.2d 870 (3rd Cir. 1982) (copyrightability of an audio-visual game embodied in ROM); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3rd Cir. 1983) (copyrightability of operating program embodied in ROM).

In these and many other cases, the registration practices of the Copyright Office assisted the courts in determining issues that had never previously been raised. If section 411(a) is eliminated as an incentive, courts will be asked to rule on an increased number of novel copyright issues, without benefit of an administrative record to expedite their proceedings. Copyright owners with questionable claims will seek to enforce rights by asking the courts -- often in the context of a shortfused temporary restraining order or a preliminary injunction -- to rule directly on their claims without risking the negative implications that would arise from a possible Copyright Office denial of registration. Attorneys with weak cases or novel cases would have a powerful incentive to bypass the Copyright Office in precisely the kind of case in which the courts want to have the advice of an expert agency.

Claims to copyright protection for industrial designs and similar works on the fringe of the copyright law would be directly presented to the courts.

Another consequence of eliminating the section 411(a) incentive would be to thrust upon defendant's counsel the task of raising the issue of foreign ineligibility under section 104 of title 17. Section 104 is highly technical, and there are instances where nationals from countries having no U.S. copyright relations can nevertheless secure U.S. protection. For example, all unpublished material is subject to protection, as are works first published in a Universal Copyright Convention country. Presently, the Copyright Office screens out ineligible foreign works from the vast bulk of foreign material which is eligible. As a result, eligibility issues are virtually never raised in litigation. If section 411(a) is eliminated as an incentive to register, nationals of ineligible countries will file their actions directly in federal court. The absence of an administrative record would make it very difficult for a defendant's counsel to even evaluate the eligibility issue.

Question 7:

> Please provide the information requested in the preceding question, but limited to works originating in Berne member states (i.e., if section 411(a) were retained for works of U.S. origin).

Answer:

As previously stated, no estimate can be provided on the consequences of eliminating registration as a condition of suit, and this would hold true with respect to Berne Union works. In general, foreign claimants are probably less familiar with the U.S. registration system than U.S. claimants. For this reason, possibly a higher percentage would decide to forego registration if the incentives were weakened. No estimate can be made, however, on what this percentage might be.

The Copyright Office concerns rest more on the impact on the consistency and quality of copyright jurisprudence than on the sheer number of cases, although the number could easily be substantial.

Question 8:

> The Copyright Office's opposition to changes in section 411(a) rests in part on "the procedural requirements applied by other members of the Berne Union." How many Berne member countries require a work originating in another Berne country to be registered before an author or other copyright proprietor may seek to redress, enjoin, or be compensated for infringement? How many permit such enforcement without the prerequisite of registration?

Answer:

Of the 76 Berne member states, it is difficult to ascertain whether countries have the same procedural requirements as the United States, but all Berne countries maintain some procedural requirements to enforce copyright. A comprehensive report would encompass internal regulations and ordinances of Union members that are not readily available to the Copyright Office and cannot be analyzed in the time available for these responses. Nevertheless, although it appears that the benefits and presumptions vary, more than one fifth of the Berne countries have public systems providing for the registration of copyright. If one considers author registries as well, the percentage of registration systems increases to one fourth. At least nine Berne countries have registration systems that are mandatory in certain respects -- that is, failure to comply results in loss of protection, or completely bars maintenance of the right. Some of these countries exempt foreign works. Some may apply the Convention directly and the court would exempt foreign works. At least two (Argentina and Uruguay) appear not to exempt foreign works. Moreover, some laws provide that one or more but not all remedies obtain when the work has not been registered. For example, Canada limits a plaintiff to injunctive relief and seizure of infringing copies, where the work was not registered at the time of infringement if defendant proves "innocence" as to the existence of the copyright; even actual damages are not available.

The United States system may be unique in that a claimant has the right of access to the courts against an infringer whether registration is made or denied. Our system is more clearly compatible with Berne than those systems in other Berne countries that are mandatory or make the right to any damages dependent on prior registration.

Question 9:

> **Section 411(a) now permits an infringement action to be brought with respect to a work the Copyright Office has refused to register, so long as the Copyright Office is served with a copy of the complaint. How many cases in each of the last five years have been instituted under this provision? In how many of these cases did the Register of Copyrights exercise his option to become a party to the action on the issue of registrability?**

Answer:

Over the past five years, the Copyright Office has been served with a copy of a complaint under §411(a) in 13 cases; four in 1983, of which we entered two, three in 1984, and we entered all three, two in 1985, which we entered; one each in 1986 and 1987, and we entered both cases. So far there have been two §411(a) cases in 1988, one of which we are entering. Thus, out of the §411(a) notifications received, the Office has entered more than 75% of the cases.

But the major point here is not the number of cases brought but the effect on copyright jurisprudence, should the Copyright Office not have the opportunity to be heard on the issue of copyrightability. The agency's expertise regarding the copyrightability of the work, given its long administration of the copyright laws, has proved beneficial, and the courts have relied upon it. This is true particularly as courts are asked to rule on an increasing number of novel high technology issues in the arcane field of copyright law. The extreme value of §411 is in connection with questionable claims that the Copyright Office has found uncopyrightable even under its "Rule of Doubt." Obviously, the volume of this kind of case, especially that becomes the subject of litigation, is not great and the reason for that is because of the difficulty of overcoming the presumption that the Copyright Office has correctly applied the law.

Without §411 many more cases would reach the courts and they would be deprived of our advice in deciding precisely the kind of case where they find it most helpful.

Question 10:

> **One key to the goal of leaving U.S. moral rights law unaffected by Berne adherence is the question of whether the treaty is self-executing. The goal of all the bills is to ensure that U.S. copyright disputes are resolved under U.S. law, not by direct enforcement of the treaty or by reference to the practices of other Berne countries. Do you think we can achieve that goal of insuring against a "self-executing treaty"? Do you have any suggestions for refinement of the statutory language to achieve that goal?**

Answer:

The Ad Hoc Working Group on U.S. Adherence to the Berne Convention (Ad Hoc Report) concluded that while some countries' laws provide for ratification of an international treaty to incorporate that treaty into its domestic law, in other countries, particularly those following the British common law tradition, the treaty is not self-executing. The Ad Hoc Report points to judicial construction, legal authorities' analyses of the law of international treaties, and the Convention itself to support its conclusion.

The Copyright Office agrees that the Congress can and should make absolutely clear that the rights specified in the Berne Convention cannot be granted and applied directly by U.S. courts, except as expressly legislated by the Congress. The task is not an easy one, and the greatest possible care must be exercised if the objective of nonself-execution is to be achieved.

The Copyright Office recommends adoption of both of the solutions of S. 1301 and S. 1971. That is, a specific statement in title 17 that Berne is not self-executing is essential, and a provision that causes the implementing amendments to the Copyright Act to take effect only after adherence to Berne should also be adopted. The unknown factor is, of course, the interpretation of treaty obligations by certain judges, if they should find that the copyright legislation falls short of conferring all the rights specified in the treaty. Discussion of the Congressional findings in the legislative reports on the subject of nonself-execution should be as clear as possible. The Copyright Office at this time has no further suggestions for statutory language but offers its help should Congress want to address a particular objective, for example, a statement regarding judicial construction as to self-execution.

In commenting on the Ad Hoc Working Group's Final Report on Berne Adherence, Professor Kernochan (of Columbia University School of Law) has recommended a specific reservation in the document of accession and consent that Berne adherence rests on the understanding that its provisions are not self-executing in the United States. The Copyright Office agrees with this recommendation.

Question 11:

> Mr. Karp's testimony before this subcommittee on February 18 includes the following observation:
>
> > Article 5 of the [Berne] Convention itself makes it impossible for any of Berne's provisions to apply in this country to the preponderance of U.S. copyrighted works -- unless Congress enacts legislation explicitly granting such protection. Under Articles 5(1) and 5(3) of Berne, works of United States origin -- including works first published here and unpublished works of U.S. nationals -- are entitled only to such protection as U.S. law

> > provides, and this country is not required to grant those works Berne-level protection unless it chooses to do so. Our obligation under Berne is only to provide the Berne level of protection to works of foreign origin.
>
> Please comment on this analysis. Do you agree that even if a court, despite Congressional and Presidential findings to the contrary, were to conclude that Berne is self-executing, the text of Berne itself provides no warrant for applying Berne standards to works of United States origin?

Answer:

Although some authorities disagree, (see Professor Howard Abrams' comment in the Final Report of the Ad Hoc Group on Berne), the Copyright Office agrees that by its terms the Berne Convention does not govern protection for works in their country of origin. However, although U.S. nationals would be "entitled only to such protection as U.S. Law provides" it would be unlikely that higher level protection would be accorded authors of Berne Union countries than would be accorded U.S. authors -- for long, at least. Either the courts or the Congress would find a way to give equal protection to U.S. nationals.

Question 12:

> S. 1971 includes a Congressional finding and declaration that "title 17 of the United States Code does not provide an author with the right to be named as a work's author or to object to uses or changes to the work that would prejudice the author's reputation or honor." In light of the provisions of 17 USC 106(2), giving the copyright owner the exclusive right to prepare or authorize the preparation of derivative works, and of other provisions of current law, is this proposed finding an accurate statement of current law?

Answer:

The moral right that gives the author the right to be named as a work's author is generally considered one category of paternity right known as the author's right of authorship. That right has not been recognized widely in the United States under any legal basis. Until recently the general rule applied by United States courts has been that unless an author secures the right to be designated as author by contract, he has no right to require that his name be applied to his work. Although that rule has been altered to some extent by state law in the states of California, New York, and Massachusetts, as well as by a Ninth Circuit opinion interpreting the Lanham Act, the Congressional finding in S. 1971 that title 17 does not provide an author with the right to be named as a work's author is correct.

The Copyright Act of 1976 also does not grant a general moral right to prevent distortion, mutilation, or other modification of a work, independent of the copyright itself. Under section 106(2) of the Act, the owner of a copyright can prevent anyone from making a derivative work without his consent. The Congressional finding in S. 1971 regarding an author's right to object to uses or changes to a work is essentially correct, but would be improved by a specific reference to nonexistence of the integrity right "independent of ownership of the copyright."

Question 13:

> On March 1, 1988, Senator Hatch placed in the Congressional Record a proposed amendment to the Administration's Berne adherence bill (S. 1971), which, among other things, would preempt to some degree the authority of state courts to rule on claims of moral rights or of creators rights equivalent to moral rights, and the authority of state legislatures to legislate in this area. The proposed amendment would also appear to have some impact on future federal legislative activity, and the decisions of federal courts in this field.
>
> Please comment on this proposal, and on the general question of whether Congress, in legislating to implement U.S. adherence to Berne, should include provisions that are intended to influence the future course of development of federal, state, or common law on the rights of authors to claim authorship of a work or to object to distortion, mutilation or other derogatory actions in relation to such a work.

Senator Hatch's proposed amendment to S. 1971 to freeze the status of moral rights under the present law in the United States is based on the premise that the act of ratification of the Berne Convention in and of itself could give courts and state legislatures a legal basis, or incentive to expand moral rights, notwithstanding language in the implementing legislation stating that the specific provisions in the Convention (including Article 6bis) are not self-executing. Accordingly, the proposal would amend the implementing legislation to provide that there is a real difference between moral rights under Article 6bis of Berne and those rights that exist under federal or state statutes or judicial construction that are the "equivalent" to moral rights under Article 6bis. In addition, it would amend the legislation so that it would explicitly state that no moral rights are created by the act of U.S. accession to Berne, and would provide that the existing rights that are the "equivalent" of moral rights may not, after the effective date of the implementing legislation, be expanded by "Federal or State statute or by judicial construction," except with respect to an individual State's authority to afford authors rights available in other states.

Opponents to such an amendment point out that a provision in the implementing legislation clarifying Congress' intent that the Convention is not self-executing is all that is necessary to signal to courts and state governments that Congress does not intend for accession to Berne to lead to the expansion of existing moral rights or the addition of new moral rights under various legal theories. Some of these opponents do not desire the adoption under the U.S. copyright law of specific moral rights provisions. However, they would not attempt to interfere with the natural development of the law interpreting the Lanham Act, common law theories of libel, publicity, privacy and unfair competition, contract theories, and state legislation in the area of moral rights, since federal statutory copyright law historically has never attempted to preempt the development of state (and federal Lanham Act) law development in these areas. The Copyright Office finds it difficult to disagree with this point of view.

Senator DECONCINI. I thank the Senator from Iowa.

Thank you, Mr. Oman, very much, and, Mr. Flacks and Ms. Schrader, for being with us.

Mr. OMAN. Thank you very much.

Senator DECONCINI. Our last witness will be Irwin Karp, National Committee for the Berne Convention.

Mr. Karp, we have your full statement here and we will print it in the record in full, if you'd be kind enough to summarize it for us, please.

STATEMENT OF IRWIN KARP, NATIONAL COMMITTEE FOR THE BERNE CONVENTION

Mr. KARP. Thank you, Mr. Chairman.

I will not only summarize my statement, I will summarize a summary of my statement.

Senator DECONCINI. Very good. Do you want the full summary put in, too? We can accommodate you. [Laughter.]

Mr. KARP. I want to thank you very much for this opportunity to testify. I am here primarily as chairman of the now-defunct organization called the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, which is a group formed at the State Department's request to do a technical study on the question of compatibility of U.S. law with Berne. We did that study. The members of the ad hoc group devoted a considerable amount of time to preparing a report which appears in the transcript of your subcommittee's 1985-1986 hearings, and I refer to it in my statement. I have summarized in the statement the conclusions that the report came to.

This was not an effort on behalf of adherence; it was, rather, an effort to open discussion and analyze these questions which Mr. Kastenmeier, the administration witnesses, and others have testified to and will be testifying to before you.

I am not appearing on behalf of the National Committee for the Berne Convention, and I would like the record to show that any comments I make——

Senator DECONCINI. You say you are not appearing on that——

Mr. KARP. No. I am chairman of that group, but I am not appearing on its behalf. I am here primarily to talk about the ad hoc group's report, and that's what my statement does. I do make some comments beyond the report in my statement, and they are made solely on my own behalf.

Let me just touch very briefly on two or three major issues as they relate to our report. Berne is not a self-executing treaty, as you've heard over and over, and correctly so. I might add one element that should be kept in mind. Under the Berne Convention, its provisions can in no event—no event including moral rights provisions—can in no event apply to works of U.S. origin. That means every work that's first published in this country and every unpublished work of American author.

Even beyond all of the obstacles that the bills now contain and will undoubtedly include in their final form, obstacles to that so-called self-executing effect, Berne itself says it does not apply to the protection of works of U.S. origin. Every member of Berne has absolute freedom to give whatever protection it wants with respect to works of which it is the country of origin. Time magazine is not only protected by your bills against self-execution, it's also protected by the Berne Convention.

The point was made about whether we should freeze moral rights protection, and I think there may be a little misunderstanding that I could clear up. All of the bills except the administration bill—in other words, Senator Leahy's bill and the House bill—very definitely make it clear that the Berne provisions are in no way incorporated into our law, and they do it six different ways.

On the other hand, it would be, I think, erroneous to try to freeze U.S. common law, the Lanham Act, and all of those other provisions outside of our Copyright Act that apply to so-called moral rights. The position taken by most groups who support Berne is that they don't want the moral rights protection we now have to be increased or diminished by virtue of our entering Berne. I don't know if many groups would want to use Berne for the purpose of denying whatever development may occur outside of the Copyright Act with respect to this problem. As our report points out, and you have been told, our law is compatible now with Berne on the subject of moral rights.

Let me speak briefly on the question of registration since it has come up, and since I think it's important. Let me say, very bluntly, I think we must join Berne. I'm wholeheartedly in support—and I speak personally—of the U.S. joining Berne. I do think that section 411 should be repealed. If it isn't repealed, we should still join Berne.

The Berne Convention's most important provisions actually are those which state that the exercise and enjoyment of rights granted to an author—and that means by every member-country in its own legislation—that those rights shouldn't be subject to any formality, and the major formalities are notice, which is being repealed, and registration of copyright as a condition for suit.

We have several different stimuli in the Copyright Act for registration. The least important of all is section 411 which requires registration in order to sue. For reasons I explain in my statement, section 411 can only account at most for a handful of registrations every year. We now have half a million registrations per annum. As compared to those half million registrations and millions of existing registrations from the past, we have a handful of lawsuits every year. So it isn't exactly stimulating land office business for the Copyright Office to require registration as a condition of suit.

On the other hand, the argument is being made that registration for suit is not a condition for enjoying and exercising rights granted by our Copyright Act. Let me just say this briefly and then I will come to a close. It's a fundamental principle of copyright law, as Judge Learned Hand and others have pointed out, that a copyright is a monopoly and the very essence of a copyright is that it permits its owner to prohibit others from reproducing or otherwise using the work. The essence of a copyright is the right to sue for infringement.

A long time ago it was stated that Blackstone had pronounced a general and indisputable rule—where there is a legal right, there is a remedy; and it is a settled and invariable principle that every right when withheld must have a remedy and every injury its proper redress. That was said by Chief Justice Marshall in *Marbury* v. *Madison.* The case had nothing to do with copyright obviously, but it is a basic principle of our law. If you don't have a remedy, you don't have a right, and nowhere could that be truer than the Copyright Act.

The problem is simply this: that when a copyright owner cannot exercise his remedies except if he registers, then he really has no right unless he complies with the condition. I think that's flatly in violation of section 411.

The difficulty in keeping section 411 is not for the few people who have to register every year as a condition for suit. The real risk is what retaining it might do abroad. The most important benefit we've had from Berne in every member country is that they don't do to us what we do to their authors. We do not have to register copyrights or use notices in all of the other countries to which we export or in which we publish or distribute motion pictures, perform music, and so forth. If we did have to register, it would be a terrible problem. Copyright owners would be in the same position as U.S. trademark owners who often have very little protection abroad because with a trademark you must register country by country, and they can't afford to do it. That's the basis for our concern.

It's not any desire to diminish the Copyright Office's business. Dr. Bagsch said, when he testified to your committee, that registration and notice are the two areas where we have to revise our law. He said we can either do it by making registration voluntary or adopt a 2-tier approach. Actually, tens of thousands of registrations are made voluntarily every year because of benefits to the copyright owner, and we have two much more potent compulsions (than section 411) in the Copyright Act to induce people to register: sections 412 and 410(c). Bagsch also said he did not believe that any Copyright Office jobs would be lost or registrations diminished if section 411 were repealed.

One of the problems that face U.S. workers abroad involves both the "backdoor" to Berne and registration; when American copyright proprietors go to an inhospitable Berne country to sue, they face, as Mr. Flacks told you, great difficulty in proving that they had simultaneously first published in a Berne country, and therefore were entitled to sue.

I just received a copy of an opinion of a Thai court, and I'm sure you'll hear much more about it, involving the Universal motion picture "The Sting," which was a huge commercial success in this country. The court in Thailand held that "The Sting" was not protected even though Universal Pictures claimed that it was entitled to Berne protection in Thailand since it had simultaneously "first published" the film in Canada.

It was almost impossible to bring witnesses after many years to prove that fact, and, anyway, the Thai judges said enough copies weren't distributed in Canada to constitute "publication." They went beyond that and struck what I think is a very chilling note. They said that Universal never registered its copyright in Canada. Canadian registration is purely voluntary, but they went out of their way to use the failure to make a voluntary registration part of the reason for denying copyright protection in Thailand, a Berne country, on the basis of Canadian simultaneous publication.

If we had been members of Berne, none of this would have happened. Universal would have been entitled to sue in the Thai court and would have only had to prove infringement, and would have recovered damages. That is one of the most important reasons for us to get into Berne and one of the reasons why we're concerned about section 411; what it will do abroad (as an example of how to use registration to defeat copyright violation), not what it will do here.

Thank you.

[The prepared statement of Mr. Karp follows:]

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
SENATE COMMITTEE ON THE JUDICIARY

Summary of Statement of Irwin Karp on S. 1301, S.1971, H.R. 1623, and H.R. 2962 To Implement U.S.Adherence to The Berne Convention

I. The Ad Hoc Working Group Report. The Group, formed at the State Department's behest, prepared a Report on compatibility of U.S law with Berne. H.R. 1623, said Chairman Kastenmeier, "is based, in part, on (its) toil".

II. Berne is Not A Self-Executing Treaty. The Report concluded Berne is not self-executing, and the protection it stipulates can be enforced here only under explicit provisions enacted by Congress. Moreover, the Bills specifically prevent self-execution. And under Berne (article 5), its provisions do not apply to works of U.S. origin, e.g., those first published here and U.S. authors' unpublished works. They receive only such Berne-level protection as Congress chooses to enact.

III. U.S. Law Protecting Moral Rights is Compatible With Berne For several reasons, present U.S. protection of authors' moral rights is compatible with Berne, and no changes are required. Dr. Arpad Bogsch, director of WIPO (Berne's administrator) is of the same opinion (letter attached. Senators Leahy and Hatch, sponsors of S.1301 and S. 1971, believe U.S. law of moral rights now satisfies Berne, and no changes are required. Senator Leahy notes any moral rights amendment "could be a contentious distraction from the effort" to achieve Berne adherence. Supporters of adherence urge "neutrality" on moral rights; implementing legislation should not not expand or reduce present protection. There is no basis for magazine publishers' fear that U.S. adherence would expand moral rights protection here.

IV. Copyright Registration as a Condition For Suit Is Incompatible With Berne and Sec. 411 Should be Repealed. Under Berne, authors' "enjoyment and exercise" of their rights cannot be subjected to"formalities." Sec. 411 incompatibly subjects exercise of their basic right - to redress infringements - to the formality of registration before suit. Therefore, sec. 411 should be repealed. Copyright Office suggestions this would reduce the flow of copies to Library of Congress, via registration deposits, has no merit Sec. 411 accounts for very few registrations. The vast majority of registrations are made voluntarily, or under the much more potent compulsion of secs. 412 and 410(c), added in 1976, which require registration before infringement or shortly after publication to preserve the essential remedies of statutory damages, attorney's fees and prima facie effect of registration certificates. Prior to 1977, the Copyright Act imposed far less compulsion to register; the remedies just mentioned were not restricted as they now are under secs. 411 and 410(c). Few of the more than 500,000 registrations made annually, and millions of existing registrations, are attributable to sec. 411 -- there are fewer than 2,000 infringement suits annually; hundreds are for infringing performances of music, much of it long-since registered.

V. Recordation As A Condition of Suit Is Incompatible With Berne For the same reasons, the recordation requirement of sec. 205(d) is not compatible with Berne and should be repealed.

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Statement of Irwin Karp on S. 1301, S.1971, H.R. 1623, and H.R. 2962 To Implement U.S.Adherence to The Berne Convention

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Mr. Chairman, my name is Irwin Karp. I appreciate this opportunity to testify on the pending legislation, which would implement United States adherence to the Berne Convention by changing certain Copyright Act provisions to make them compatible with the Convention's standards. I was Chairman of the "Ad Hoc Working Group", formed at the State Department's behest, and I will discuss some of these changes in the context of the Group's Report on compatibility of our Copyright Act with Berne -- particularly, proposed revisions affecting moral rights, copyright right registration, recordation, copyright notice and Berne's status as a non-self-executing treaty. I also am Chairman of the National Committee for the Berne Convention, but I do not testify today on its behalf; the opinions I express are my own.

I. The Ad Hoc Group's Report

The Ad Hoc Group's Report is included in the 1986 Transcript of your Subcommittee's hearings on the Berne Convention, chaired by Senator Mathias [May 16, 1985 and April 15, 1986], Serial No. J-99-25,

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*The "Ad Hoc Working Group on U.S. Adherence to the Berne Convention" at pp. 427-522. (My references to the Report give page numbers of the Transcript.) The Report and comments from interested parties also appear in Columbia-VLA Journal of Law and the Arts (Vol.10, No. 4, Summer 1986).

The Report was considered in the preparation of the pending Bills. Introducing H.R. 1623, Chairman Kastenmeier said, "My Bill is based, in part, on the toil of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention. I would like the record to reflect the hard work of the members of that Group ...", Congressional Record, March 16, 1987, H. 1293.

Senator Leahy also cited the Report when he introduced S.1301. Speaking of moral rights, he said "The ad hoc committee of copyright experts convened by the State Department studied the moral rights issue in some detail. Its report states that:

> There are substantial grounds for concluding that the totality of U.S. law provides protection for the rights of paternity and integrity sufficient to comply with [Article] 6bis (of the Berne Convention, as it is applied by various Berne countries."

Congressional Record, May 23, 1987, S 7370.

II. The Ad Hoc Report's Conclusions on Compatibility of United States Copyright Law with the Convention

A. The Ad Hoc Group, whose members are listed below*, was formed at the State Department's suggestion to study the compatibility of the U.S.

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*Norman Alterman, Jon A. Baumgarten, Leonard Feist, Morton David Goldberg, Irwin Karp, I. Fred Koenigsberg, Bella Linden, William Maxwell, Gary Roth, Hamish R. Sandison, August W. Steinhilber, Robert Wedgeworth, and, ex officio, Harvey J. Winter (Executive Secretary), Acting Register of Copyrights Donald C. Curran, Lewis Flacks, and Michael S. Keplinger. Affiliations of the members are listed in the Foreword of the Report solely for identification and do not imply endorsement of the Report by the organizations mentioned.

Copyright Act with the Berne Convention. Article 36(2) of the Convention requires a country to "be in a position under its domestic law to give effect to the provisions of" Berne at the time it becomes a member.

The Ad Hoc Group decided that 14 basic subject areas might involve problems of compatibility . Study papers on these subjects were drafted, reviewed and revised by the Group. They were the 14 chapters of its Preliminary Report, which was distributed to the Senate and House copyright subcommittees, executive agencies, the Copyright Office, and to interested individuals and organizations whose comments were invited. Comments were considered in preparing the Group's Final Report, and were published as an appendix to it.

B. The Report considered whether U.S. law -- the U.S. Copyright Act, other federal and state statutes, and common law -- provides the protection that Berne requires each member to grant to works originating in other Berne-member countries. The Report concluded that the following provisions of the Copyright Act are compatible with Berne: the Cable Compulsory License (sec. 111), Exemptions for Certain Public Performances and Displays (sec. 110), the Phonorecord ("mechanical") Compulsory License (sec. 111), the Public Broadcasting Compulsory License (sec. 118), the Deposit requirement (sec. 407), the Registration requirements of sections 408 and 412 (but not those of secs. 405(a) and 411), the Subject Matter requirements of secs. 101 and 102 (except for architectural works), and the Works-Made-for-Hire provisions (secs. 101 and 201(b)). The Ad Hoc Report also concluded that protection of moral rights under existing U.S. law is compatible with the Berne Convention.

The Ad Hoc Report concluded that the following provisions of the Copyright Act are not compatible with the requirements of the Berne Convention: the Juke Box Compulsory License (sec. 116), the now-expired Manufacturing Clause (sec. 601), the Notice requirement (sec. 401), Registration as a condition for suit (sec. 411) and to cure omissions of notice (sec. 405(a)), the Renewal Clause (sec. 304(a)) and the copyright term for anonymous/pseudonymous works (sec. 303(c)). A summary of the Report's conclusions has been submitted to the Subcommittee.

III. Congress and the President Are the Arbiters of Compatibility

It should be noted that Congress and the President are the sole arbiters of the compatibility of U.S.law with Berne. As the Ad Hoc Report observes, they must decide which sections of the Copyright Act are not compatible with Berne, and what revisions of those sections are required to make them compatible.* (at pp. 431-432).

The President's June 18, 1986 message to the Senate requesting advice and consent for U.S. adherence to the Berne Convention said:

> " As indicated in the report of the Department of State, implementation of the Convention will require legislation. Until this legislation is enacted, the United States instrument of accession will not be deposited with the Director General of the World Intellectual Property Organization."

Only Congress will determine what changes in the U.S. copyright law are necessary to make it compatible with Berne, subject to the President's power to approve or disapprove the implementing statute. Dr. Arpad Bogsch, Director General of the World Intellectual Property Organization, which administers Berne, informed the Ad Hoc Group that the Convention has no procedure for determining if the laws of new member nations are compatible with Berne -- and that no country's instrument of accession has ever been rejected because of incompatibility of its law with the Convention.

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* U.S. law must be compatible with Berne for works of foreign origin. Berne does not require compatibility for a member nation's protection for works of which it is the "country of origin." E.g. when magazines are first published here, the United States is their country of origin; therefore, Berne does not apply to U.S. protection for those rights. Ad Hoc Report, at p. 430.

Moreover, United States courts have no power to determine whether or not our law is compatible with Berne; nor do they have the power to correct any incompatibilities they might perceive, particularly since Berne is not a self-executing treaty. As the Ad Hoc Report states:

> "If a government fails to implement such a treaty with the legislation required to protect private rights, as stipulated by the treaty, 'it becomes the subject of international negotiations ... it is obvious that with all this the judicial courts have nothing to do and can give no redress.' Head Money Cases, 112 U.S. 580, 598-99 (1884)", Ad Hoc Report at p. 503.

IV. Berne is Not a Self-Executing Treaty

In Chapter XII, the Ad Hoc Group's Report (at pp. 501-505) asks:

> Is the Berne Convention a "self-executing" treaty whose provisions, therefore, would automatically become law in the United States upon its accession to the Convention? Or is Berne an "executory" treaty which would not, of itself, give rise to rights or rights of action in the United States?

The Report concluded that Berne would not be be a self-executing treaty in the United States and that the protection it stipulates "could only be enforced here to the extent provided by existing U.S. law or by further legislation Congress enacted to implement ratification" of Berne.

A. Judicial Construction

As the Report notes, the issue of "self-executing" effect is determined by U.S. law, and the Convention is not self-executing in other Berne countries. The Report cites decisions holding that where a treaty and relevant United States statute contain many detailed provisions that give rise to private remedies, as do Berne and our Copyright Act, the "social consequences" of self-execution are unacceptable under our constitutional principles of construction. At p. 504.*

But beyond this, and other principles of construction negating self-executing status for Berne, it is the rule under U.S law that when a treaty

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* An internal Report (1981) prepared in the Copyright Office said that "... courts would be reluctant to set aside specific requirements of the Copyright Act for the general directives of Berne. Therefore, Berne cannot be considered a self-executing treaty." ["Can the United States Ratify the Berne Convention Without Implementing Legislation?", p. 65.] Although provided by the Office to the Ad Hoc Group, the Report says it "does not necessarily represent the views of the Copyright Office."

"expressly provide(s) for legislative action" it is not self-executing (at p. 504, citations omitted.) Article 36 of Berne requires each member to adopt "measures necessary" to apply the Convention, and to be in a position "under its domestic law" to give effect to Berne's provisions. The same provisions appear in the Paris (Industrial Property) Convention, whose Article 17 is almost identical with Berne's Article 36. In Mannington Mills v. Congoleum Corporation, 593 F.2d 1287 (3d Cir. 1979), the Court held that Article 17 of the Paris Convention precluded it from being a self-executing treaty in the United States.

B. Congress Can Bar Self-Executing Status for Berne

Aside from the rules of judicial construction which would prevent Berne from having self-executing effect in the United States, Congress can prevent the Convention from being self-executing. And the pending bills do so.

1. Sections 2 and 11(c)(1) of S.1301 provide: that Berne is not self-executing: that U.S. obligations under Berne may be performed only pursuant to our domestic law; that the amendments made by the Bill, together with existing law, enable this country to meet its obligations under Berne; that Berne's provisions shall be given effect only under the Copyright Act and other relevant provisions of federal and state law, including common law, and shall not be enforceable in any action brought pursuant to Berne's provisions.

Essentially, S. 1971 contains the same provisions (secs. 2 and 4(c)(iii)), as do H.R. 1623 (secs. 3 and 6) and H.R. 2962 (secs. 2 and 4(c)(iii)).

The Copyright Office "Commentary" on its Discussion Bill (submitted to your Subcommittee in 1986) said that such provisions "would likely be extraordinarily persuasive." (Serial No. JJ-99-25, at p. 662.) That probably is an understatement. These provisions which are an essential part of, and indeed the basis for, the implementing legislation, are more likely to be conclusive -- especially so, because of the principles of judicial construction cited in the Report.

2. As an additional legislative barrier to self-execution, S. 1301 (Sec. 11) and H.R. 1623 (sec. 16) provide that the implementing statute (and the amendments it makes) will take effect on the day after the date on which the Berne Convention enters into force with respect to to the United States. Thus, if either Bill were enacted, that Act and the amendments it made would be later in time than Berne's effective date of application here. Therefore, the provisions of the Act -- including those barring self-executing effect for Berne -- would prevail for this reason as well.

3. The Senate can create still another barrier to self-execution by stating its intent that Berne is not self-executing, in its resolution of ratification. Ad Hoc Report, at p. 505.

C. Berne Itself Bars Self-Execution For A Preponderance of Copyrighted Works

Beyond all of the domestic legal barriers that prevent Berne from being treated as a self-executing treaty in this country, Article 5 of the Convention itself makes it impossible for any of Berne's provisions to apply in this country to the preponderance of U.S. copyrighted works -- unless Congress enacts legislation explicitly granting such protection. Under Articles 5(1) and 5(3) of Berne, works of United States origin -- including works first published here and unpublished works of U.S. nationals -- are entitled only to such protection as U.S. law provides, and this country is not required to grant those works Berne-level protection unless it chooses to do so. Our obligation under Berne is only to provide the Berne level of protection to works of foreign origin. See discussion in Ad Hoc Report, at pp.430-431.

On the other hand, whether we join Berne or not, U.S. publishers, producers, etc. would continue to be bound by the moral rights laws of other countries (as they have for decades), when they publish, distribute or make other uses of copyrighted works in those countries.

V. U.S. Law Protecting Moral Rights Is Compatible With Berne

A. The Berne Moral Rights "Issue"

Article 6*bis* of Berne provides that "the author shall have the right

> ... to claim authorship of the work, and
>
> ... to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

The right of paternity and the right to protect the work's integrity are commonly referred to as "moral rights". Berne also provides that "the means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

Chapter VI of the Ad Hoc Report addresses the question of whether current protection of "moral rights" in the United States is compatible with the Berne Convention. If it is compatible, then provisions granting additional or different moral rights protection would not have to be added to the Copyright Act in order to permit U.S. adherence to Berne.

The Ad Hoc Report deals only with this question, and not with the issue of whether, for reasons other than Berne, present U.S. law protecting moral rights should be changed.

B. The Ad Hoc Group's Conclusion

The Ad Hoc Report concluded that "the protection of moral rights in the United States is compatible with the Berne Convention" because of these factors:

> ... the substantial protection now available for the real equivalent of moral rights under statutory and common law in the United States;
>
> ... the lack of uniformity in protection (of moral rights) by other Berne nations;
>
> ... the absence of moral rights provisions in the copyright laws of some Berne nations; and
>
> ... the reservation of control over remedies to each Berne country. Report, at p. 458.

These factors are discussed in Chapter VI of the Ad Hoc Report, at pp. 459-467.

C. Dr. Bogsch's Opinion on U.S. Protection of Moral Rights

The National Committee for the Berne Convention had asked Dr. Arpad Bogsch, Director of the World Intellectual Property Organization, to state his views on whether enactment of statutory provisions on "moral rights" was necessary in order for the United States to conform to the Berne Convention. Although I am testifying individually, and not on behalf of NCBC, I think Dr. Bogsch's opinion -- expressed in a letter of June 16, 1987 --might be of interest to the Subcommittee, and I offer a copy of the letter for inclusion in the Record. Dr. Bogsch said:

> "In my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6bis of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes. I believe that in the United States the common law and such statutes (Section 43(a) of the Lanham Act) contain the necessary law to fulfill any obligation for the United States under Article 6bis."
>
> "There are several countries of the common law system, and among them the United Kingdom (that joined the Convention exactly 100 years ago), that are bound by the Berne Convention, including its Article 6bis, which have never had and do not have at the present time statutory provisions on moral rights."

D. Provisions of the Berne Implementing Bills

S. 1301 does not contain any provision on moral rights. In his statement on the Bill, Senator Leahy noted that various federal and state statutes, the common law of torts, including defamation, and the right to prepare derivative works (sec. 106 (2)) "protect the interests implicated by moral rights." Congressional Record, May 29, 1987; S 7370.

S.1971 also does not contain any moral rights amendment. In introducing the Bill, Senator Hatch noted that the Administration and a growing body of international legal scholarship "finds no need to go beyond current Federal and State law to protect the moral rights required by the Berne Convention." Congressional Record, December 18, 1987, S18408.

Senator Leahy quoted the Ad Hoc Report's conclusion that the totality of U.S. law protects moral rights sufficiently to comply with Berne's

Article 6bis (Report, at p. 466.) He also said this conclusion was supported by the record of this Subcommittee's 1985 and 1986 hearings, "including advocates of domestic moral rights legislation"; a record that he said "provides persuasive evidence that no changes in U.S. copyright law are needed in order to meet Berne's minimum standard with respect to moral rights." Congressional Record, May 29, 1987, S.7371.

Senator Leahy emphasized that "Any moral rights amendment to the Copyright Act would be highly controversial." He said:

> "The debate on any such proposal could be a contentious distraction from the effort to bring the United States into the Berne Convention. Whatever the merits of various proposals to strengthen protection for moral rights under the Copyright Act, none of them would advance the goal of Berne adherence which is the only object of this legislation. Accordingly, (like the prior Senate Bill), the Berne Convention Implementation Act of 1987 does not contain any provision on moral rights." Ibid.

S. 1301, 1971 and H.R. 2962 do not contain any moral rights amendment to the Copyright Act, and enactment of any of them would neither expand nor reduce current U.S. protection for moral rights.

H.R. 1623 does contain moral rights amendments (secs. 7, 9 and 13). However, it now appears that these provisions will be deleted, so that H.R. 1623 will be consistent with the other pending bills on the subject of moral rights.

The Ad Hoc Group's Report expressed no opinion as to whether moral rights provisions should be included in the implementing legislation. As an individual, and not as a member of the Ad Hoc Group, I do believe the correct approach on moral rights is that taken in Senator Leahy's bill (S. 1301) and in S.1971, introduced by Senators Hatch and Thurmond. I would be willing to answer questions if the Subcommittee wished to have my views.

E. Fear of "Self-Executing" Expansion Of U.S. Moral Rights Protection

The primary opposition to U.S. adherence to Berne comes from some magazine and newspaper publishers who express a fear that the very fact that we join Berne would expand present U.S protection of moral rights -- even though the implementing legislation contains provisions negating any change in the scope of such protection. If the legislation is "neutral" on moral rights, as most supporters of adherence strongly believe is appropriate, then U.S. entry into the Convention cannot affect any expansion of moral rights protection.

The implementing statute would prevent that change from occurring, and would be a further bar to any such self-executing effect because of the provisions discussed above. In addition, Berne itself precludes any implication that our accession would, in any manner, change U.S. protection of moral rights for works of U.S. origin. A federal or state judge who erroneously relied on U.S. adherence to Berne as the reason for expanding current U.S. protection would be reversed, just as would a judge who misinterpreted any other Act of Congress. The remote risk that some court might incorrectly interpret a statute, or ignore its prohibitions is, of course, a poor reason for not enacting it.

VI . Notice of Copyright

1. Chapter VII of the Ad Hoc Report (at pp. 468-9) concluded that section 401's requirement of a copyright notice in all publicly distributed copies is not compatible with Article 5(2) of Berne, which provides that the enjoyment and exercise of authors' rights (in countries other than the country of origin) "shall not be subject to any formality."

S. 1301 (sec. 5), S. 1971 (sec. 5), H.R. 1623 (sec. 10), and H.R. 2962 (sec. 5) revise section 401 to make use of the copyright notice voluntary rather than mandatory, which is compatible with Berne. The Bills also provide -- as an inducement to placing copyright notices on copies -- that if the voluntary copyright notice does appear on copies of a work, no weight shall be given to the defense of "innocent infringement" in mitigation of damages. This is compatible with Berne.

2. But the benefit of this stronger remedy would be unavailable to many authors of poetry, articles, graphic materials, etc. which are first published in a periodical, anthology or other collective work, since the bills repeal section 404. This section now provides that the copyright notice for a collective work satisfies the notice requirement for every contribution included in the magazine issue, anthology, etc. Because of section 404, therefore, it is not necessary at present for each contribution to carry its own separate notice. But since publishers of these collective works often do not include a separate copyright notice for each contribution, and carry only their own notice for the entire work, many authors would not get the benefit of a voluntary copyright notice under the pending bills. Therefore, section 404 should not be repealed.

3. Sections 405 and 406 impose penalties for erroneous or omitted copyright notices and, therefore, are incompatible with Berne. In order to comply with Berne, the sections should be modified to limit their subsequent application to copies without notices or with defective notices that were publicly distributed before the effective date of the implementing legislation. The bills contain provisions to this effect.

VII. Registration of Copyright Claims

Chapter IX of the Ad Hoc Report (at p. 473) concluded that two of the provisions in our Copyright Act requiring registration of copyright claims were incompatible with Article 5(2) of Berne.

A. Registration to Cure Omission of Copyright Notice

Sec. 405(a) requires registration as a condition for curing an omission of copyright notice, and therefore is not compatible with Berne. This incompatibility would be eliminated by provisions, just discussed, which limit application of section 405 to copies publicly distributed before the effective date of the implementing legislation.

B. Registration as a Condition For Suit

1. Section 411 requires that a copyright owner must register the copyright before commencing an infringement suit. The Ad Hoc Report (at pp. 477-482) concluded that requiring this condition for works of foreign origin is not compatible with Berne. The reason is that the condition makes "the enjoyment and the exercise" of a fundamental right granted by the Copyright Act -- the right to prohibit and obtain redress for

infringements -- "subject to a formality". Article 5(2) of Berne provides "the enjoyment and the exercise" of rights granted to authors "shall not be subject to any formality." The Copyright Office believes section 411 is compatible with Berne. But its view is not consistent with the plain letter of Article 5(2), and it is contrary to the opinions of highly regarded Berne commentators. (Ad Hoc Report at pp. 480-482.)

2. S. 1971, H.R. 1623, and H.R. 2962 do not repeal section 411. They retain registration as a condition for suit. At a minimum, it seems clear, registration should not be required for works of foreign origin. Retention of section 411 for works of U.S. origin would not be incompatible with Berne since, by reason of Article 5(3), Berne does not apply to them. However all of the Bills wisely reject the "two-tier" approach.

C. Repeal of Section 411 Would Not Injure the Library of Congress

1. The Copyright Office suggests that eliminating registration as a condition for suit: (a) would significantly reduce the number of works which are registered; (b) thus reduce the number of books, magazines, etc. the Library of Congress acquires through these registrations (1 or 2 copies of a work must be deposited with or before its registration.)

There really is no merit to the Copyright Office's suggestion. Eliminating section 411 and its requirement of registration as a condition for suit would not reduce the incentives and the truly potent stimuli that lead copyright owners to register claims to copyrights in their works.

Section 411 accounts for very few registrations . The vast majority of registrations are made voluntarily*, or under the compulsion of sections 412 and 410(c) [added in 1976]. These registrations account for most of the books and other works the Library of Congress acquires as deposits with a registration. The balance of the Library's acquisitions under the Copyright Act are obtained through the mandatory deposit provisions of section 407. The bills change section 407 by enlarging its scope to require deposits even if copies of published works do not contain copyright notices. This revision is not incompatible with Berne since deposits required by section 407 are not a condition for "the enjoyment and the exercise" of rights granted to authors.

Repeal of section 411 would not affect the far more potent registration stimuli, sections 412 and 410(c). Section 412 compels authors and other proprietors to register copyright claims before an infringement occurs to preserve their right to claim statutory damages and attorney's fees (registration within 3 months of first publication permits those remedies for a prior post-publication infringement.) Statutory damages and attorneys fees (secs. 504 and 505) are essential remedies, indeed the only effective ones in many categories of infringement suits. Sec. 410(a) requires registration within 5 years of publication to obtain mandatory prima facie effect for a registration certificate, an important benefit.

Unlike sections 412 and 410(c) which compel registration within short time periods to preserve important benefits for the future, section 411 compels registration only if an infringement occurs; it is satisfied by a registration made after the event. Over 500,000 copyrights are registered annually, and there are millions of existing copyrights. However, fewer than two thousand infringement suits are brought each year, and hundreds of them involve musical compositions which had long since been registered, and many others concern fabrics on textile patterns and similar materials. Very few registrations (and copies for the Library of Congress) can be attributed to section 411.

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* e.g, To create a record for licenses, sales, and other transactions; provide evidence of ownership; prove a work's existence at a given date.

I should note that from 1909 to 1977, the Copyright Act imposed far less compulsion to register than does the 1976 Act. The Supreme Court had ruled that registration, under the 1909 Act, could be made many years after publication; and it could be made after an infringement, without without depriving authors of either statutory damages, attorneys fees, or prima facie effect of the registration certificate . These remedies were provided in the 1909 Act as the foundation for protection of authors' rights. The loss of these essential remedies and benefits, for failure to register within short time periods, were imposed after 1977 in sections 412 and 410(c of the 1976 Act, and are not changed by the pending bills.

4. S. 1301 would repeal section 411 but replace it with a new penalty to compel early registration. Section 7 of the bill would deprive authors and other copyright owners of statutory damages and attorney's fees for all future infringements if registration is not made within 5 years after first publication, even though it is made before infringements occur. This new restriction would be far more damaging to authors than section 412, and it is unnecessary. For the reasons just mentioned, there is no need to replace section 412 by another registration stimulus.

VIII. Recordation

The Ad Hoc Report concluded that section 205(d) is not compatible with Berne (at p. 474.) This section requires recordation of of transfers of copyright as a condition for infringement suits by the transferee of the rights involved. For the same reasons mentioned in connection with registration under section 411, such recordation is not necessary to stimulate registrations or the accompanying deposits of copies for the Library of Congress. The actual incentives for voluntary registration and the compulsions of sections 412 and 410(c) do that job very well.

IX. Deposit of Copies Under Section 407

Section 407 requires copyright owners to deposit 2 copies of the best edition of every work (or phonorecord) published with notice of copyright in the notice. The Ad Hoc Report concluded (at. p. 842) – that section 407 is not incompatible with Berne because it is enforced by monetary penalties for noncompliance and does "not affect the enjoyment or exercise of the copyright.

IX. The Jukebox License

The Ad Hoc Report concluded (at pp. 446-447) that the Jukebox compulsory license in section 116 is not compatible with Berne with respect to works of foreign origin. It now appears that the changes in section 116 which the pending bills provide, to make it compatible with Berne, are acceptable to the parties directly affected by the section.

* * * *

WORLD INTELLECTUAL PROPERTY
ORGANIZATION

世界知识产权组织

ORGANIZACION MUNDIAL
DE LA PROPIEDAD INTELECTUAL

ORGANISATION MONDIALE
DE LA PROPRIÉTÉ INTELLECTUELLE

المنظمة العالمية للملكية الفكرية

ВСЕМИРНАЯ ОРГАНИЗАЦИЯ
ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

(784)-20
(105)-321

June 16, 1987

Dear Irwin,

You let me know that the National Committee for the Berne Convention wished to hear my views on whether having statutory provisions on "moral rights" was a condition of being in conformity with the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 1971).

In my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6*bis* of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes. I believe that in the United States the common law and such statutes (Section 43(a) of the Lanham Act) contain the necessary law to fulfil any obligation for the United States under Article 6*bis*.

/...

Irwin Karp, Esq.
Attorney at Law
40 Woodland Drive
Rye Brook, New York 10573
United States of America

SUMMARY OF CONCLUSIONS OF AD HOC WORKING GROUP ON U.S. ADHERENCE TO THE BERNE COPYRIGHT CONVENTION

Compatible Provisions

The following provisions of the United States Copyright Act are compatible with the Berne Convention, with respect to works of foreign and U.S. origin.

Chapter 1 CABLE COMPULSORY LICENSE

The cable compulsory license provision (17 U.S.C. Sec. 111) is compatible with Berne. Article 11*bis*(2) allows the right of retransmission of a broadcast to be exercised by compulsory licensing under conditions which are met in Sec. 111.

Chapter 2 EXEMPTIONS TO PUBLIC PERFORMANCE AND DISPLAY RIGHTS

Sec. 110 exemptions to the right of public display are compatible with Berne, since the Convention does not stipulate that right.

Sec. 110 exemptions to the public performance rights are substantially compatible with Berne under Article 10(2), or the "minor reservations" understanding.

Chapter 5 THE MECHANICAL LICENSE

The mechanical license for making and distributing phonograph records, Sec. 111, is compatible with Berne, under its Article 13(1).

Chapter 6 MORAL RIGHTS

The protection for moral rights under U.S law is compatible with Berne's Article 6*bis*, considering: the remedies now available here, the lack of uniformity of protection in other Berne countries, absence of moral rights provisions from some national laws, and reservation of control over remedies to each member country.

Chapter 8 PUBLIC BROADCASTING COMPULSORY LICENSE

The Sec. 118 public broadcasting compulsory license for performances is compatible with Berne under its Article 11*bis* (2) which allows compulsory licensing under conditions that are met in Sec. 118.

It is unclear whether the Sec. 118 compulsory license for reproduction of musical and graphic works for the broadcast programs involved is compatible with Berne. It might be argued that it is compatible with the spirit and letter of the "special cases" exception of Article 9(2).

Chapter 9 DEPOSITS

The deposit provisions of Sections 407 and 408 are compatible with Berne since they are not conditions of copyright protection.

Chapter 9 Registration

Sec. 408 is compatible with Berne since its permissive registration requirements are not a condition of copyright, and therefore do not conflict with Article 5(2).

Sec. 412 is compatible with Berne since it makes registration a condition for obtaining certain remedies, not a condition for all protection of the work.

N.B. See Chapter 9 commentary under "Incompatible Provisions", below.

Chapter 12 IS BERNE A SELF-EXECUTING TREATY

Berne is a self-executing treaty under U.S. constitutional law and therefore implementing legislation by Congress is required to give effect to the provisions of the convention. This is compatible with Article 36.

Chapter 13 SUBJECT MATTER

The provisions of Secs. 101 and 102 concerning protected subject matter are compatible with Berne's Articles 1, 2 and 7(4), with the exceptions of buildings and other works of architecture: and the possible exceptions of mask works for semiconductor chips and works of applied art whose artistic features and utilitarian aspects of a useful article are not separate and independent.

Chapter 14 WORKS MADE FOR HIRE

The work-made-for hire provisions of Secs. 101 and 201(b) are compatible with Berne, which does not define an "author" or stipulate that the person who actually created a work must be deemed its author, but rather leaves the matter to national legislation. The U.S term of copyright for works made for hire does not always fit neatly within the Berne standards; but the Convention seems intended to give member countries considerable discretion in dealing with such works.

Incompatible Provisions

The following sections of the U.S. Copyright Act are incompatible with Berne as applied to works of foreign origin. Because of Article 5(1) & (3) of Berne, the sections are not incompatible as applied to works of U.S. origin.

Chapter 3 JUKE BOX LICENSE

The jukebox license granted by Section 116 is not compatible with Berne as to works of foreign origin because of the exclusive performance right in musical works granted in Article 11(1)

Chapter 4 THE MANUFACTURING CLAUSE

The manufacturing clause provisions of Secs. 601-603 are not compatible with Berne because of Article 5(2) which provides that the enjoyment and exercise of rights in a work "shall not be subject to any formality."

Chapter 7 NOTICE

Sec. 401, requiring a notice of copyright in published works is incompatible with Berne since it conditions the preservation of copyright on the formality of notice, in contradiction of Article 5(2).

Chapter 9 REGISTRATION

Sec. 405(a), requiring registration to cure omission of notice, is incompatible with Berne under Article 5(2) which prohibits enjoyment of rights from being subject to any formality.

It is unclear whether Sec. 405(b), which governs relief against innocent infringers, is compatible with Berne. (ibid.)

Sec. 411 is incompatible with Berne since it requires registration as a condition to instituting an action for infringement.

N.B. See Chapter 4 commentary under "Compatible provisions", above.

Chapter 10 RENEWAL AND DURATION

Sec. 304(a)'s renewal registration provisions are incompatible with Berne because: (i) the requirement of a renewal is a formality prohibited by Article 5(2) and (ii) because the term of renewal copyright is shorter than the life plus fifty year term required by Article 7(1).

Sec. 303(c)'s provisions for duration of copyrights in anonymous or psuedonymous works are incompatible with Berne as to such of those works that are published more than 50 years after creation, because Article 7(3) provides for a term of protection continuing for fifty years after the work is made publicly available.

Senator DeConcini. Mr. Karp, several witnesses have pointed out that protection of architectural works remains an issue that needs to be addressed. Did your group look at this issue at all?

Mr. Karp. Yes.

Senator DeConcini. Do you have any advice that you can give to us?

Mr. Karp. Our report concluded that there might be technical incompatibility between the protection we give and that required by Berne for works of foreign origin. Now, ironically, since Berne doesn't apply to works of U.S. origin, I don't think it makes any difference in disputes involving two buildings in this country. I see no problem on that.

Senator DeConcini. We have before us bills by Representative Kastenmeier, Senator Leahy, and Senator Hatch. Would you conclude that all three of these would result in U.S. law conforming to the requirements of Berne if we passed them as they are?

Mr. Karp. Yes.

Senator DeConcini. You have no trouble with any of those? Of course, we heard from Congressman Kastenmeier this morning—I don't know if you were here or not—regarding his conclusion that his bill, the portion of it dealing with moral rights, should be excluded or changed.

Mr. Karp. Yes.

Senator DeConcini. I have no further questions. We will submit some questions to you, Mr. Karp.

[Questions and answers, subsequently supplied for the record, follow:]

IRWIN KARP
ATTORNEY AT LAW
40 WOODLAND DRIVE
PORT CHESTER, N.Y. 10573

914/939-5386

March 14, 1988

Dear Randy and Steve:

Enclosed are my answers to the written questions from Senator Hatch and Senator Grassley.

Apropos the "moral rights" changes proposed by David Liebowitz and Art Sackler:

1. As we mentioned, their attempt to deny "moral rights" at worst would preclude any protection for the rights to claim authorship and object to mutilation -- which are what Berne calls on its members to protect, and which our law now does protect; and would certainly cause great and costly confusion.

2. No freeze on the these rights should be imposed, for the reasons stated in Answers 1(c) and 3 to Senator Hatch and both parts of Answer 2 to Senator Grassley.

3. For the same reasons, Title 17 should not attempt to preempt state protection for the rights to claim authorship and object to mutilation.

4. I think the provisos in the memorandum I sent you are more than enough to make it clear that foreign law would not be applied in adjudicating claims here that these rights had been infringed, and that these rights would neither be increased or reduced by virtue of adherence to Berne or its provisions or the enactment of the implementing statute. The provisos restate some of your proposals, clauses already in the Bill (restated with specific reference to the two rights), the new clause in the Kastenmeier Bill), and par. (d) -- precluding protection here under foreign statutes and decisions.

With kindest regards,

Sincerely,

Irwin Karp

Randall R. Rader, Esq.
Steven J. Metalitz, Esq.

cc: Edward H. Baxter, Esq.

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
Senate Committee on the Judiciary

Answers by Irwin Karp to Questions By Senator Hatch (March 12, 1988)

QUESTION 1: You undoubtedly have heard the concern of some publishers and broadcasters about moral rights. They fear moral rights could disrupt their customary editing practices and work for hire relationships. In the first place, would their fears be justified if the full French system of rights of paternity and rights of integrity were implemented in the United states?

ANSWER : No, for these reasons:

(a) France protects these rights under its own statutes and decisions. Obviously, these will not be implemented in the United States. Under several safeguard provisions contained in all of the bills, neither the provisions of Berne concerning these rights (Art. 6bis), nor the statutes and decisions of other countries, will become part of U.S. law.

(b) U.S. adherence to Berne does not change the work for hire relationships of publishers, broadcasters, or anyone else.

(c) There already is protection under U.S law for rights of paternity and integrity. That U.S. protection has not disrupted customary editing practices of these American publishers and broadcasters or their work for hire relationships until now, nor have law suits disrupted those practices or relationships. Neither U.S. protection nor law suits will not do so after we join Berne, since neither our adherence nor Berne's provisions will change U.S. law protecting those rights or employment-or-hire relationships. If we fail to join Berne, these publishers and broadcasters will be no better off with respect to "moral rights" than if we do join Berne.

(d) As Dr. Bogsch and other Berne experts have advised, magazines and books are published in other Berne countries by their publishers (and U.S. publishers or subsidiaries) without any disruption of editing practices or relations with employees. They are not afflicted with suits for protection of paternity and integrity rights, and the few cases that have upheld these rights under the laws of individual Berne countries involved unique and egregious mutilations, usually of paintings or sculpture which are not works for hire.

(e) The fears of these magazine publishers concerning moral rights are not justified, and are not shared by the many companies and organizations who support U.S. adherence to Berne. More than sixty of these supporters, who represent tens of thousands of individuals and companies that create and distribute copyrighted works, or speak for broad constituencies of educators, librarians and school boards, are listed on the cover of the NCBC Statement in support of United States Adherence to the Berne Convention (copy attached.)

QUESTION 2: What protections can be built into implementing legislation to ensure that these disruptions caused by moral rights do not occur?

ANSWER: Disruptions are not, and will not be, caused by the continuation of present U.S. protection for the rights of paternity and integrity. The only real question is whether U.S. adherence to Berne would cause any change in present U.S. protection of those rights. The answer is that the pending Bills already contain several provisions that prevent any change in that existing U.S. protection as a consequence of our adherence to Berne.

QUESTION 2 (cont'd.): Do you think it helps to specifically state that implementing legislation does not create, expand or diminish any moral rights?

ANSWER: Although present provisions of the Bills already accomplish that result, there is no reason why the foregoing statement should not be added.

QUESTION 3: How would you respond to the publishers' concerns that courts or State legislatures might take the additional step of implementing moral rights, even if Congress does not create moral rights by law?

ANSWER: (a) The vast preponderance of companies who publish, produce, disseminate and otherwise use copyrighted works -- and their attorneys -- do not share this concern. One reason for this is that U.S. entry into Berne will neither stimulate nor prevent any state legislature that decides to do so from granting protection for rights of paternity and integrity. The possibility that some legislatures might enact such legislation has always existed, exists today, and will continue to exist whether or not we join Berne.

(b) Moreover, there may be serious constitutional questions as to whether Congress -- even if it decided to -- could prevent such state legislation , whether or not the U.S. adheres to Berne.

(c) The same considerations apply to decisions by state and federal courts involving existing copyright and non-copyright principles under which they presently can protect the rights of paternity and integrity in appropriate circumstances.

(d) Actually, the magazine publishers who express these concerns have even less cause for their professed fears -- because they have even less exposure to moral rights claims of independent authors -- than the many companies that support Berne without alarm and without demanding freezing or diminution of present principles of U.S. law protecting the rights of paternity and integrity.

QUESTION 4: Legislation has been introduced to reenact the Manufacturing Clause. If the Manufacturing Clause, which has expired, were reenacted, what would that mean for United States compliance with Berne?

Answer: (a) The Manufacturing Clause would be incompatible with Berne if it were applied to works of foreign origin.

(b) Reenactment of the Clause could produce trade and copyright retaliation by Berne Countries; in 1986 they threatened a massive boycott of U.S. goods if the Clause were extended. Extension of the Clause also would violate U.S. obligations under GATT.

(c) In his concurring opinion in Authors League et al. v. Oman (U.S. Court of Appeals, 2d Cir., 1986), Judge Oakes said the Clause probably violated the First Amendment. The majority opinion, upholding the Clause, was based on a premise that seems conflict with the Supreme Court's 1986 conclusion that copyright is the "engine of free expression." (Harper & Row v. Nation Enterprises).

QUESTION 5: S. 1301, the Leahy Bill, and S. 1971 are very similar. In one respect, however, they differ. S. 1971 retains the current registration requirements of U.S. copyright law. S. 1301 would eliminate mandatory registration, though it contains some provisions encouraging voluntary registration. Which approach do you prefer and why?

ANSWER: (a) Both S. 1301 and S. 1971 retain the present permissive registration system, and the powerful registration incentives of sections 412 and 410(c). The difference is that S. 1301 would repeal section 411. For the reasons mentioned in my statement, I think section 411, requiring registration as a condition for suit, should be repealed -- and that it should not be replaced with the provisions that S. 1301 proposes to "encourage" registration. Section 411 only accounts for a handful of the 560,000 or more registrations now made annually, it is not compatible with Berne, and it could well provoke very harmful retaliation and emulation from other countries.

(b) I an unable to express a preference between retaining section 411 (with its serious drawbacks) and enacting the provisions proposed in S. 1301 to "encourage" registration, since they are unnecessary and would unfairly penalize failures to register or record within a specified period by permanent forfeiture of those remedies for infringement that are the most important to many authors, publishers, and others: i.e., statutory damages and attorneys fees.

(c) I would prefer to see section 411 repealed, and the substitute registration proposals of S. 1301 deleted. But I think Congress should enact a Berne implementing bill regardless of the solution it adopts for the section-411 issue.

National Committee for the Berne Convention
July 2, 1987

WHY THE UNITED STATES
SHOULD JOIN
THE BERNE COPYRIGHT CONVENTION

As of September 1, 1987, the following organizations have subscribed to this Statement:

ADAPSO (The Computer Software and Services Industry Association)
American Association of School Administrators
American Association of University Professors
American Council on Education
American Library Association
ASCAP (American Society of Composers, Authors & Publishers)
Applied Data Research, Inc.
AAUP (Association of American University Presses)
Association of Research Libraries
Autodesk, Inc.
Baltimore County Schools
BMI (Broadcast Music, Inc.)
CBEMA (Computer and Business Equipment Manufacturers Association)
Comshare, Incorporated
Council for American Private Education
The Data Group Corporation
Deneb Systems, Inc.
The Walt Disney Company
Distribution Management Systems Corp.
Elsevier Science Publishing Company, Inc.
Gencom, Inc.
Harcourt Brace Jovanovich, Inc.
I.M.R.S., Inc.
Integral Business Systems
IBM (International Business Machines Corporation)
IIA (Information Industry Association)
International Reading Association
Johns Hopkins University
Management Science America, Inc. (MSA)
Music Educators National Conference
National Clearinghouse for Bilingual Education
National Commission on Libraries and Information Science
NMPA (National Music Publishers Association)
NSBA (National School Boards Association)
SESAC Inc.
Speech Communication Association
SPSS Inc.
Supply Tech, Inc.
TLB, Inc.
Unitech Software, Inc.
U.S. Catholic Congress
United States Council for International Business
Vanguard Atlantic Ltd.
ViewPlan, Inc.
VM Personal Computing, Inc.
WOS Data Systems, Inc.
John Wiley & Sons, Inc. Publishers

As of January 1, 1988, the following organizations also had subscribed to this Statement:

Ashton-Tate Corporation, Harris Publishing Company, Hudson Hills Press, Inc., IPL (Intellectual Property Owners, Inc.), Lotus Development Corporation, MPAA (Motion Picture Association of America), Music Publishers Association of the United States, Peter Norton Computing, and Intellectual Property Committee (consisting of): Bristol-Myers Company, E.I. du Pont de Nemours and Company, FMC Corporation, General Electric Company, General Motors Corporation, Hewlett-Packard Company, IBM Corporation, Johnson & Johnson, Merck & Co., Inc., Monsanto Company, Pfizer Inc., and Rockwell International.

March 12, 1988

SUBCOMMITTEE ON PATENTS, COPYRIGHT AND TRADEMARKS
Senate Committee on the Judiciary

Answers by Irwin Karp to Questions by Senator Grassley

QUESTION 1: How is U.S. law already compatible with Berne?

ANSWER: The provisions of the United States Copyright Act already satisfy almost all of the requirements of the Berne Convention. For example, section 106 grants authors the exclusive rights stipulated by Berne, and section 302 provides that a U.S. copyright shall last for the author's life plus 50 years after death, the term of protection required by Berne's Article 7. Too, U.S. protection for the rights of of authors to claim authorship and object to the mutilation of their works (the so-called moral rights) satisfy the requirements of Berne's Article 6bis.

Only a few changes are required to make U.S. law compatible with Berne and these are dealt with in the Bills being considered by the Subcommittee.

QUESTION 2: What is the impact of so called "moral rights" protection in the implementation of Berne?

There will be no impact. The rights of authors, under U.S. law, to claim authorship and object to mutilation of their works (moral rights) would neither be expanded nor diminished by reason of the implementation of Berne. The Bills contain several provisions that prevent any changes in U.S. law by reason of adherence to Berne, and mandate that no rights can be enforced in the U.S. under the Convention. The implementing legislation assures that the respective rights of authors, publishers, and others concerning claims of authorship or mutilation will not be changed by U.S. adherence to Berne.

QUESTION 2 (cont'd): Do we need to specifically freeze moral rights?

ANSWER: No. The Copyright Act's present provisions that affect rights to claim authorship or object to mutilation are not changed by the implementing legislation; nor is Section 43(a) of the Lanham Act, under which these rights have been protected. Moreover, it may not be possible (and is not neccessary) for Congress to "freeze" protection of these rights that also is provided by state common law and by state statutes: there are basic Constitutional barriers, and judges must be free to apply existing principles to the differing situations and circumstances presented in individual cases.

The meaningful protection of the status quo on "moral rights" already is provided by the implementing Bills which state explicity that there is to be no expansion or reduction of existing rights under Title 17, common law, or other federal or state statutes, by reason of either U.S. adherence to Berne or the Bills themselves

QUESTION 3: How does U.S. law already provide the minimum level of protection for these "moral rights" which is required by Berne?

ANSWER: That minimum level of protection for the rights to claim authorship and object to mutilation is now provided under certain sections of the Copyright Act (e.g., right to prevent unauthorized derivative works and right of first publication; sec. 106); under various common law principles, including libel, contract, and misrepresentation; and under section 43(a) of the Lanham Act.

As mentioned in my statement to the Subcommittee, Dr. Bogsch, Director General of WIPO, the adminstrator of Berne, has confirmed that this combination of protection, including common law, would fulfill the obligations of the United States under Berne's Article 6bis (the "moral rights" proviso.) His letter is attached to my statement. The adequacy of present U.S protection also is confirmed in Chapter VI of the Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, which appears at pp. 458-472 of the Subcommittee's 1985-6 hearings on the Berne Convention (Serial No.J-99-25).

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914/939-5386

March 22, 1988

Edward H. Baxter, Esq.
Chief Counsel
Subcommittee on Patents, Copyrights
and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Ed:

Enclosed is my answer to Senator Leahy's question as to how authors will benefit if the United States joins the Berne Convention. I also am sending a copy to Steve Metalitz.

I call your attention to the last three paragraphs on page 2 and to page 3.

With kindest personal regards.

Sincerely,
Irwin
Irwin Karp

cc: Steven J. Metalitz, Esq.

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

Answer by Irwin Karp to Question by Senator Leahy concerning
S. 1301 and S. 1971. (March 21, 1988)

Question

You have many years of experience in representing the copyright interests of authors. How will individual authors benefit if the United States joins the Berne Convention?

Answer

The works of American writers, playwrights and songwriters are published, performed, broadcast, and recorded throughout the world. They derive income from these uses in countries that grant them copyright in their works. They are denied income from uses in countries that do not grant them copyright, or only give them inadequate protection. Moreover, legalized piracy of their works in a nation which has no copyright obligations to us under an international treaty produces copies, records, cassettes, etc. that are exported into the world market, thus robbing American authors of income from sales in other countries.

Consequently, American authors will benefit economically if the United States enters the Berne Convention. They will receive protection in the many Berne countries that now have no copyright relations with the United States. This will entitle them to compensation for uses of their works in those countries, and help reduce their losses elsewhere from piratical copies now produced in those countries.

American authors also will be assured of automatic protection in Berne nations by virtue of our membership in the Convention. This is important to those book authors and playwrights who license their own rights abroad and cannot cope with the expense or complexities of arranging simultaneous publication in a Berne nation in order to obtain Berne protection through the "backdoor." Automatic Berne protection also is important for many American authors who publish with smaller firms, non-profit publishers and University Presses who are unable to publish simultaneously in other countries for "backdoor" protection.

The long-range international copyright and economic interests of American writers, playwrights and songwriters -- no less than those of corporations that produce and distribute motion pictures, software, books music, records, and other copyrighted works -- will be best served if the United States joins the Berne Convention. In an age when effective copyright protection of American writers' works can only be assured on an international basis, through a high-level treaty, it is imperative for them that the United States adhere to Berne: to give our country a meaningful voice in Berne's management and development of new policies, to preserve copyright protection, and to give the United States the right to veto any proposed revisions of Berne that would impair foreign copyright protection of works by American writers.

I should point out that U.S. authors of novels, biographies, histories and other "trade books" first published here receive royalties and other payments made by foreign publishers for the rights to republish their works in countries that give them copyright protection. When the U.S. publisher licenses these foreign uses for a book, its author receives much of the income. American writers who reserve foreign rights in their books license them to publishers in other countries and receive all of the income.

American playwrights retain all foreign rights in their plays and grant licenses for foreign productions. American songwriters, of course, receive substantial income from foreign performances of their works -- in countries that grant adequate copyright protection -- through the performance rights societies in those countries and their American counterparts ... ASCAP, BMI and SESAC.

I feel obliged to add one important caveat. There are many American authors whose works are not published or performed abroad, or who do not earn significant income from foreign uses. They too could benefit to some extent from U.S. adherence to Berne. But it would be a poor bargain for them to have the U.S. enter Berne at the cost of diminishing the present level U.S. domestic protection -- under common law, or federal or state statutes -- of their rights to claim authorship and to object to mutilation or distortion of their works that impairs their reputation.

S. 1301 and Mr. Kastenmeier's amendment of H.R. 1623, adopted in the House Subcommittee's mark-up, contain balanced provisions that completely and fairly preserve the status quo for protection of these two rights by barring any change as the result of U.S. adherence or because of Berne provisions. In addition, the amended version of H.R. 1623 explicitly provides that these rights --- correctly described -- are not expanded or reduced by U.S. adherence to the Berne Convention [Sec. 4(c)]. Moreover, it supplements requirements already in the Bills that U.S. obligations under Berne may only be performed under U.S. domestic law. It is clear, as the Bills provide, that protection in this country for the rights to claim authorship or object to mutilation can only be granted under U.S. "domestic law", and cannot be granted under the Berne Convention or under judicial decisions or statutes of other countries.

United States entry into the Berne Convention with preservation of that status quo is fair to American authors. But adoption of additional provisions now urged by the magazine-publishers coalition would imperil the present rights of American authors -- under domestic common law and federal statutes -- to claim authorship of their works and object to mutilation. The coalition's proposals are totally unnecessary to preserve the status quo, and indeed would drastically alter it. And they pose great risk to these existing rights of American authors.

If these magazine-publisher clauses were written into the implementing bills, American writers who derive no income, or only small income, from foreign uses of their works would be better served if the bills were defeated. And, many other writers might well take the same position.

The concerns of magazine publishers as to the effect of Berne adherence on the rights to claim authorship and object to mutilation -- concerns which are not shared by the vast majority of American copyright organizations and enterprises who support the Bills -- have been scrupulously and fairly allayed by many provisions in S. 1301 and H.R. 1623. American authors are entitled to some consideration - since their rights are at stake. If the Subcommittee were to seriously consider accepting the recent magazine-publisher proposals, in all fairness it should reopen its hearings and allow various authors' groups to testify. I should note, that motion picture directors -- who are not "authors" in the copyright sense -- and screenwriters have been allowed to testify at length, even though they do not speak for writers of books, plays and music, and have no interest or expertise in the rights of these true "authors" to claim authorship of their works and to object to mutilations and distortions that prejudice their reputations.

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THE WALL STREET JOURNAL MONDAY, MARCH 21, 1988

Letters to the Editor

Artists Need Protection From Immoral Piracy

Worries about "an orgy of litigation and legal confusion" if the U.S. joins the Berne Copyright Convention ("Artists Don't Deserve Special Rights," editorial page, March 8) are figments of a complete misconception about pending legislation and existing U.S. law on "moral rights."

Countless organizations and companies support our entry into the Berne Convention because it ensures effective protection abroad for U.S. books, music, computer software, films and other copyrighted works, and will help them fight widespread international piracy that costs American copyright industries and authors hundreds of millions of dollars annually.

The Berne Convention requires member-countries to protect authors' rights to claim authorship of their works and to object to mutilations and distortions that prejudice their reputations—loosely referred to as "moral rights." These rights have been protected here for decades under a body of American law consisting of Copyright Act provisions, the Lanham Act, and common-law rules of libel, contract and false representation. The bills to implement membership in Berne prohibit any changes in this body of U.S. law. The rights to claim authorship and object to mutilation cannot be increased or reduced by reason of our adherence to Berne, and the bills require that they be enforced under existing U.S. legal principles.

U.S. publishers, film companies, newspapers and broadcasters have not been inhibited or harassed by an orgy of litigation under this existing law; and the overwhelming support for Berne adherence reflects the realization that our adherence to the convention will not change the law under which they and their authors have functioned for decades.

IRWIN KARP
Director, National Committee
for the Berne Convention
Rye Brook, N.Y.

Senator **DeConcini**. Thank you for being with us today and helping us on this subject matter.

The committee will stand in recess until March 3 on this subject matter, when we will conclude the hearings.

[Whereupon, at 11:12 a.m., the subcommittee recessed, to reconvene on March 3, 1988.]

THE BERNE CONVENTION

THURSDAY, MARCH 3, 1988

U.S. SENATE,
SUBCOMMITTEE ON PATENTS,
COPYRIGHTS AND TRADEMARKS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to recess, at 9:50 a.m., in room 106, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Senators Leahy, Heflin, Hatch, and Grassley.

Staff present: Edward H. Baxter, chief counsel and staff director; Cecilia Swensen, legislative aide/chief clerk; Elizabeth McFall, staff assistant; Kelly Barr, legal intern; Jon James, legal intern; Randy Rader, minority chief counsel (Subcommittee on Patents, Copyrights and Trademarks); Abby Kuzma, general counsel for Senator Hatch; Carolyn Osolinik, chief counsel for Senator Kennedy; Steve Metalitz, special counsel for Senator Leahy; Matt Gerson, general counsel for Senator Leahy; Mamie Miller, counsel for Senator Heflin; Carl Hampe, counsel for Senator Simpson; and Melissa Patack, minority counsel for Senator Grassley.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. The Subcommittee on Patents, Copyrights and Trademarks will come to order. We are starting a little late, and we apologize for that, because there is a vote going on at this very moment, until 10 o'clock, and we wanted to be sure that the members had a chance to vote.

This is the second hearing on the Berne Convention that this subcommittee has held. We hope to conclude the hearings today. We have a distinguished group of witnesses and we look forward to their testimony. Because of the time constraints, we are going to ask each witness to keep their remarks before the committee to 5 minutes so we can have time for questions. Full statements will be printed in the record for review of the entire subcommittee and the full committee.

We are going to hear a lot of information today in testimony on the subject of moral rights. Certainly this is a good forum to discuss that issue, but I think it is important also to indicate that that is an issue that may have to be reviewed another day. I am not closed to discussing a moral rights provision, but that is what I believe would be the stumbling block if we are going to have an opportunity to pass some meaningful legislation.

However, the purpose of these hearings is to receive testimony about the moral rights issue and also to hear from those who oppose U.S. adherence to the Berne Convention. We will proceed on that basis. I now would like to yield to Senator Leahy from Vermont. He was the ranking member of this committee and has had a real influence on patents and copyrights in the Senate, and really has brought us today to this hearing through his leadership along with that of McC. Mathias in the last Congress.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator **Leahy**. Thank you very much, Mr. Chairman. I am delighted we are having these hearings. I think they are extremely important.

As you know, a couple of weeks ago we had an impressive array of witnesses from the executive branch, the Copyright Office, and the House of Representatives. They told us why we should join the Berne Copyright Convention. They agreed that Berne would strengthen our dominant position in the trade of copyrighted works and hence copyright protection worldwide.

Now we are going to hear from an impressive array of witnesses from the private sector. The message, I understand, is on the whole supportive of U.S. adherence to Berne, but it is not a unanimous group. Two groups of dissenters are here this morning. Neither group, as I understand it now, takes a position of outright opposition to Berne. Both question how Berne will affect the moral rights of authors, artists and other creators. Some film directors want to include specific protections in Berne implementing legislation. At the other end of the spectrum, some magazine publishers want to freeze the development of U.S. law on moral rights.

Well, let me just state my own position so everybody will know. I think moral rights is an legitimate issue and it deserves serious consideration by the Congress. In fact, my Subcommittee on Technology and the Law conducted a hearing in May to assess ways in which advancing technology, like colorization, affect the relationship between directors and producers. But I feel equally strongly that we must not let the moral rights issue prevent us from joining the Berne Convention, which is a step that promises great benefits to creators and copyright owners.

Nor should we be diverted from this goal by any invitation to prejudge the outcome of some future debate on legislation that may be concerned with moral rights. Let me make sure that everybody is clear how I feel about that. I think that there is an issue that will eventually have to be addressed on the question of moral rights. I want to see us join Berne and then have that debate. I would not support, and in fact would actively work against any legislation that would prejudge the question of moral rights as we join Berne.

In other words, if someone wants to put in legislation that says we can join Berne only if we attach to it legislation that says that moral rights are now frozen or the whole issue is dispensed with, it is done, it is over with, I would strongly oppose that. I would work against that and I can guarantee you that would not become law.

I think what we have to do is join Berne and then raise the issue on moral rights. Which way I might go on the issue of moral rights I don't know. I think we have to learn a lot more about it, but the only practical way to achieve the goal of Berne adherence is to focus the legislation solely on the minor changes to U.S. copyright law that are needed to comply with Berne standards.

The members supporting Berne, each of the people who are here supporting Berne, have set aside some of their copyright agendas to focus on Berne because they know that through Berne they can, first, ensure that pirated computer software is not used at a loss leader in foreign stores that sell computer hardware; second, prevent American movies from being copied into the VCR format the same day they open in theaters; third, clear bookstore shelves of American works that are produced on underground printing presses; and fourth, reward the hard work that goes into the images and creations that Americans provide to the world's consumers.

So today's controversy is Berne; tomorrow's controversy is moral rights. Our common agenda today is the enhancement of worldwide protection for American works of copyright, in the interests of creators and copyright owners alike. In the service of that goal, there is no more pressing decision before us than bringing the United States into the world's premier international copyright agreement, the Berne Convention. Again, Mr. Chairman, I applaud you for having these hearings. I think they are extremely important.

Senator DECONCINI. Thank you, Senator Leahy.

I now yield to the Senator from Iowa, Mr. Grassley.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, I appreciate very much the further indepth analyses that you are making of this issue and the length to which you are going to see that all points of view are brought out.

We know that the witnesses at the hearing, last time you held the hearing, spoke about the need for Berne adherence and they did that in the context of international trade. Of course, we all learned about the importance of the industries affected by Berne in the U.S. balance of trade. These officials testifying last time saw this convention as a tool in curbing the piracy of U.S. works, improving balance of trade and also enhancing our position in negotiation.

I, just like all of my colleagues on this committee, have some concern about the issue of moral rights which of course is a point of controversy in the discussion about the Convention. Today's witnesses of course have firsthand experience in the industries which would be affected by our adherence to the Convention. I look forward to hearing their views and I believe, like most of my colleagues on this committee, the testimony today will help me as I formulate conclusive views on the issue of moral rights. That is why I see this hearing as very important.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Grassley.

I want to note that the reason Senator Hatch, the ranking member, is not here, is because he is managing a bill on the Senate floor today and asked that we proceed. I know he will be here as soon as he can.

We will proceed with the first panel, Mr. Kenneth Dam, vice president, IBM; Mr. C.L. Clemente, general counsel, Pfizer, Inc.; Mr. David Brown, Motion Picture Association of America; and Mr. Andrew Neilly, John Wiley & Sons, publishers. If you would come forward, please.

If there are no objections, we will lead off with you, Mr. Dam.

STATEMENT OF KENNETH W. DAM, VICE PRESIDENT, LAW AND EXTERNAL RELATIONS, IBM CORP.

Mr. DAM. Thank you very much, Mr. Chairman.

I appreciate your including the full written statement in the record, and I would also appreciate it if we could include in the record the position papers of the National Committee for the Berne Convention and the Coalition for Adherence to Berne.

Senator DECONCINI. Without objection, they will appear in the record as requested.

Mr. DAM. Thank you very much.

I am Kenneth W. Dam, vice president, law and external relations, of the IBM Corp. I am grateful for the opportunity to testify before this subcommittee to express IBM's strong support for U.S. adherence to the Berne Convention.

IBM's decision to actively support adherence to Berne is a result of thoughtful deliberation in which we have taken into account our interests in improving worldwide intellectual property protection through the GATT and the importance to IBM of copyright protection here and abroad.

The pace of international piracy makes Berne adherence essential to protect IBM's wide-ranging copyright interests. IBM derives over $5 billion in revenues annually from more than 4,000 computer programs published annually. Computer software is the fastest growing sector of our business.

We derive $500 million each year from our worldwide distribution of millions of copies of copyrighted books, manuals, audiovisual materials, magazines, and periodicals. We are one of the largest publishers of textbooks and other educational materials. We create, and have created for us, vast numbers of works involving many contributions in all forms of media—motion pictures, film strips, multimedia educational materials, books and manuals, magazines and periodicals.

The technology for creating, storing and communicating copyrighted works has become increasingly useful. But that same technology has made the pirate's lot an easier one. It is now no trouble at all for a pirate to knock off and distribute very large quantities of computer programs and entire program libraries.

The problem isn't confined within the borders of those countries that are failing to give our works sufficient protection. The pirated copies produced in those countries are also placed in the international stream of commerce and distributed throughout the world.

Because there isn't sufficient protection in the countries that produce those copies, IBM and others devote significant resources to cutting them off at Customs and to pursuing in court copies that do get into our country. And of course we have even less control over the importation of pirated copies into other countries. According to some estimates, our domestic software vendors lose some $800 million annually in overseas sales due to piracy.

The United States needs a higher level of worldwide copyright protection, and we will be better able to achieve it if we adhere to the Berne Convention. Berne adherence will improve our relations with the 24 Berne countries that do not belong to the Universal Copyright Convention.

The People's Republic of China is also considering adherence to Berne. Enhancement of copyright relations with the PRC is a significant incentive for Berne adherence. By the way, I am delighted to see that the delegation from the PRC is here today. We welcome their interest in Berne adherence.

Today, to ensure protection under Berne, domestic companies must undertake simultaneous "back door" publication in a Berne country. However, this "free ride" approach is expensive and uncertain.

These procedures cost IBM alone $10 million each year. For some small companies, simultaneous publication is too expensive and complicated to be a serious option, and so they forego the possibility of foreign protection through Berne. The uncertainty stems from the difficulty of proving that a copyrighted work was simultaneously published in the United States and in a Berne country.

The immediate savings of avoiding simultaneous publication would be beneficial in the short run, but in the long run, Berne adherence would enhance our leadership in the international copyright community and strengthen our bargaining position in international trade negotiations.

In bilateral negotiations with Singapore and Korea, the United States has been repeatedly asked: how can we be sincere in urging Berne levels of protection when we haven't joined Berne? In the GATT initiative we have been met with the same question. The only good way to answer that question, Mr. Chairman, is to adhere to Berne.

We agree with the statements of Senators Leahy and Hatch that we should follow the "minimalist" approach to Berne adherence, making only those few changes in our law that are necessary to comply with Berne. Berne adherence need have no significant effect on our valuable registration system or on the workings of the Library of Congress.

Under the minimalist approach, a prime example of a subject that does not have to be addressed in the enabling legislation is the moral rights "issue." We agree with Chairman Kastenmeier, with Register of Copyrights Oman, with the administration and with numerous experts, that existing U.S. moral rights protection is compatible with Berne and that adherence under the minimalist approach will neither require nor result in any change in that protection.

IBM has as much at stake in the moral rights issue as anyone in the publishing or other copyright industries. We are not claiming the benefit of Berne while expecting others to suffer risks. We are convinced that adherence does not pose a moral rights problem. There is no such risk in adopting Berne.

IBM is not alone in strongly supporting U.S. adherence to the Berne Convention. We join not only those leading industries represented at this table this morning but thousands of companies and individuals in supporting adherence to the Berne Convention.

Thank you very much, Mr. Chairman.

[Material submitted by Mr. Dam follows:]

UNITED STATES ADHERENCE TO THE BERNE CONVENTION

STATEMENT OF

KENNETH W. DAM

Vice President, IBM Corporation

before

The Subcommittee on Patents, Copyrights, and Trademarks

Committee on the Judiciary

United States Senate

100th Congress, Second Session

on

S. 1301 and S. 1971

March 3, 1988

SUMMARY OF THE STATEMENT
OF
KENNETH W. DAM
Vice President, IBM Corporation

Before

The Subcommittee on Patents, Copyrights, and Trademarks

Committee on the Judiciary

United States Senate

March 3, 1988

IBM strongly supports United States adherence to the Berne Convention.

IBM derives over $5 billion in annual revenues from more than 4,000 copyrighted computer programs that we publish each year throughout the world. We also derive almost $500 million annually from our worldwide distribution of many millions of copies of copyrighted books, manuals, audiovisual materials, magazines and periodicals. To protect our copyrights in all of these works from piracy throughout the world, it is strongly in IBM's interest that the United States adhere to Berne.

The current "free ride" on Berne by simultaneous "back door" publication is expensive, uncertain, and risks retaliation by Berne nations. Berne adherence will directly improve copyright protection for U.S. works in the 24 countries which are not UCC members. Enhancement of U.S. copyright relations with the People's Republic of China, which is now also considering adherence to Berne, is another significant incentive.

Berne adherence will enhance U.S. leadership in the international copyright community, bolster the U.S. position in bilateral and multilateral trade negotiations, and improve the chances for adopting a GATT Intellectual Property Code with dispute settlement and enforcement mechanisms for high levels of copyright protection.

IBM both creates its own copyrighted works and acquires rights in many other works created by independent authors, including computer programmers, moviemakers, photographers and composers. We have as much at stake in any moral rights "issue" as anyone else in the publishing or other copyright industries, and we have concluded that the existing American law is already compatible with the requirements of Article 6bis, and that there need be no specific moral rights provisions in the enabling legislation.

Berne adherence requires only minimal changes in U.S. law. Under Berne, our system of registration and deposit can remain as effective and valuable as it is now.

Good morning, Mr. Chairman and members of the Subcommittee. I am Kenneth W. Dam, Vice President, Law and External Relations, of the International Business Machines Corporation. IBM is grateful for this opportunity to testify before the Subcommittee to express its strong support for United States adherence to the Berne Convention.

I. IBM HAS SIGNIFICANT COPYRIGHT CONCERNS.

I believe IBM has as great an interest as any company in effective copyright protection in the United States and throughout the entire world. Let me summarize the reasons. IBM publishes in excess of 4,350 copyrighted computer programs each year, the marketing of which produces an annual revenue for IBM in excess of $5.5 billion. We distribute these programs throughout the entire world.

But IBM is by no means a creator and distributor only of computer programs. We also create and distribute internationally very significant quantities of other copyrighted works. Throughout the world, we publish more than 20,000 different titles of copyrighted books and manuals each year, including 1,250 major texts and other books published by our subsidiary, Science Research Associates, Inc. ("SRA"); and we distribute over 57 million copies of such materials each year. In our own name and through SRA, we are one of the largest publishers of textbooks and other educational materials. We develop and distribute each year thousands of different copyrighted educational and other motion pictures, sets of filmstrips, sound recordings, and multimedia materials for educational and other markets. Our annual revenue from the distribution of books, manuals and various audiovisual materials exceeds $480 million.

Since you are hearing testimony today from magazine and periodical publishers, I should point out that IBM is also a significant publisher of magazines and other periodicals which are distributed throughout the world in English and many foreign languages. Indeed, we publish over 70 different magazines and periodicals, with a total worldwide circulation in excess of 3.2 million.

To protect our copyrights in all of these works from piracy throughout the world, it is strongly in IBM's interest, and the interest of American copyright proprietors of all types of works, that the United States adhere to Berne.

II. IT IS STRONGLY IN THE NATIONAL INTEREST THAT THE UNITED STATES ADHERE TO BERNE

A. Copyright proprietors face substantial copyright piracy throughout the world.

IBM markets its products throughout the world and, in doing so, earns revenues that help to reduce the substantial deficit in the United States balance of trade. These revenues are significantly impaired, however, by the international piracy of IBM's copyrighted works.

IBM is, of course, hardly the only American victim of piracy. In its 1985 report to the United States Trade Representative on "Piracy of U.S. Copyrighted Works in Ten Selected Countries," the International Intellectual Property Alliance estimated that American copyright industries lose over $1.3 billion a year in those countries alone because of inadequate protection. Moreover, although the piracy originates primarily in countries which fail to give United States works sufficient copyright protection, the piratical copies produced in such a country are not marketed only within its borders. Rather, they are placed in the international stream of commerce, so that piratical copies are distributed throughout the world.

Indeed, we frequently find it necessary to cut off the importation of such piratical copies into the United States.

Were there sufficient protection (including enforcement of copyright rights) in the foreign countries that produce those copies, we would not be put to the significant effort and expense of invoking the procedures of the United States Customs to cut off such importation.

B. As technology advances, high-level international copyright protection becomes imperative.

New technologies for the creation, communication and enjoyment of copyrighted works have created a dynamic international market for such works. The United States is at the cutting edge of these developments, and holds over 70 percent of the world software market. The most rapidly growing area of U.S. exports is in information services and high technology products.

Ironically, new technology has also made piracy easier and more profitable. Only a few decades ago, copyrighted works could be pirated only laboriously. Today, however, the copyrighted works of IBM and other producers of computer software can be pirated with trivial effort and expense. Intellectual property with a value of millions of dollars can be reproduced and disseminated in multiple copies with comparative ease.

According to recent estimates, U.S. software vendors lose as much as $800 million annually in overseas sales due to piracy. Clearly, a high level of copyright protection is required, and it can be achieved only by adhering to the treaty which embodies that level of protection, the Berne Convention.

C. Simultaneous "back door" publication is expensive and uncertain, and risks retaliation by Berne nations.

Some opponents of Berne adherence maintain that the United States can continue to obtain the benefits of Berne without adhering. They contend this can done by continuing to utilize the "back door" of "simultaneous publication" in the U.S. and a Berne member country. That answer, however, suffices only to show that those who utilize the "back door" are aware of the benefits of Berne protection. It does not meet the problems of simultaneous publication.

Those problems are many. Simultaneous publication is a complex concept. The concept of "publication" under United States copyright law is alone a complexity, and there are no certainties as to when simultaneous publication is actually achieved. Indeed, the uncertainties grow when one takes into account the changes in technology that may permit "publication" by electronic transmission of "copies" by satellite and other means from one country to another.

Simultaneous publication can also be a very expensive procedure. For example, the Berne back door will cost IBM an estimated $10 million this year, a cost that Berne adherence would largely eliminate. A big portion of this cost is directly attributable to the extra production, legal, storage, transportation, clerical and administrative costs of publishing computer programs in Canada or Denmark simultaneously with initial United States marketing. These extra expenses, which undoubtedly are incurred by other computer software companies as well, are an inefficient and wasteful element that subtracts from the productivity of United States industry.

Such expensive procedures are of course beyond the means of most small publishers and software companies; and, as a practical matter, they are not even within the contemplation of individual authors, artists and composers.

Even if a copyright owner has gone through the substantial effort and expense of simultaneous publication, further cost and complexity must be overcome when it becomes necessary to institute an infringement action in a Berne country, especially one with which we have no other copyright relations. For example, in countries such as Turkey, Thailand

and Egypt, simultaneous publication must now be proven.[1]

If our simultaneous publication has been in Canada, the word "simultaneous" means just that. We must later prove to the foreign court's satisfaction, by submitting affidavits and possibly first-hand testimony, that IBM's work was published in the United States and in Canada on the same day. Further, we must produce evidence that on that day sufficient copies of the work were actually available for customer orders.

Moreover, these complications in proving our case in foreign countries are nothing compared to the complex procedures that we have had to put in place to assure that we are using the Berne back door effectively. On page 9, I present to the Subcommittee an outline illustrating the extra steps IBM must go through to publish a single PC computer program simultaneously in the United States and Canada. This makes the $10 million annual cost of the back door easier to understand. Among the more noteworthy complications in this procedure are the following:

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[1] Even a company that undertakes costly and burdensome publication abroad may not be successful in establishing it to a foreign court's satisfaction, as Peter F. Nolan, Vice-President-Counsel of the Walt Disney Company, testified on behalf of the Motion Picture Association of America (MPAA) before the Kastenmeier Subcommittee on September 16, 1987. Mr. Nolan explained that a senior vice president of one of the MPAA's members recently had to travel to Thailand on two separate occasions to prove simultaneous publication in a Berne country, in a suit to stop a Thai film pirate from selling videotapes of that company's motion pictures. Statement of the Motion Picture Association of America Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee (Sept. 16, 1987), at 4. Unfortunately, as Mr. Nolan explained in a letter of January 25, 1988 to Chairman Kastenmeier, the Thai court recently ruled that the motion pictures in question had not been simultaneously published.

1. It is more difficult to comply with U.S. export control regulations because the program has not yet been published in the U.S.
2. We have to make "secure" shipment to Canada, because the program is not yet available anywhere.
3. Customs clearance by Canada takes a few days.
4. We must develop special documentation of availability for sale in Canada, for future use in infringement suits.

From all this complexity flows a clear conclusion. If the United States were a Berne member, IBM would save each year the substantial sums which are wasted on "simultaneous publication," because in any infringement suit that we have to bring in a Berne country, it would be necessary to show only that the United States is the country of origin of the work being infringed. Moreover, we would no longer need to be concerned that, out of resentment of our unilateral exploitation of Berne, its members may retaliate by refusing to acknowledge back door protection or by restricting protection of U.S. works under Article 6(1) of the Convention.

BERNE BACK DOOR
CANADA COMPLIANCE
PERSONAL COMPUTER PROGRAMS
OUTLINE OF EARLY SHIPMENT PROCEDURE

5 Weeks Before U.S. Announcement	1.	Notify IBM Canada of product name, part numbers, shipping schedule, contact names.
	2.	Assure compliance with U.S. export regulations.
4 Weeks Before U.S. Announcement	3.	Request "secure" shipment of copies to IBM Canada.
	4.	Establish product prices if computer program was not intended for marketing in Canada.
	5.	Enter product information into IBM Canada order system.
2 Weeks Before U.S. Announcement	6.	Notify IBM Canada of shipment dates.
1 Week Before U.S. Announcement	7.	Expedite Canada customs clearance.
U.S. Announcement	8.	IBM Canada availability.

D. Berne adherence will facilitate copyright protection for U.S. works in 24 countries which do not belong to the UCC.

Berne adherence will clarify and improve our relations with the 24 Berne members that do not belong to the Universal Copyright Convention (UCC). Relations with these nations are important not merely because of the need to restrict piracy within the borders of those countries, but also to enable us to prevent the export of unauthorized copies from those countries into other markets throughout the world.

Register of Copyrights Ralph Oman testified before the Kastenmeier Subcommittee on July 23, 1987 that the People's Republic of China is also considering adherence to Berne, as part of its development of new copyright legislation. Enhancement of copyright relations with so important a nation as the PRC provides the United States with another significant incentive for Berne adherence.

E. U.S. leadership in the international copyright community can be significantly enhanced by Berne adherence.

The history of international copyright conferences, especially the disastrous Stockholm Conference for Berne Revision in 1967, demonstrates that the leadership of the

United States is impaired if we are not a member of Berne. While our influence cannot be discounted totally, it is significantly reduced. Mere observers are not full participants. They do not vote, nor do they have the negotiating clout of members.

Opponents of Berne adherence are apprehensive that the demands of Third World nations may impair the high-level standards of Berne protection. They fail to realize, however, that participation of the United States as a Berne member can strengthen this country's position substantially in withstanding such erosion.

Since our withdrawal from UNESCO, which oversees the UCC, we have not had a voice, let alone a formal vote, in supervising UCC-related activities. But we can now speak with force and authority if we join Berne. Moreover, any substantive revision of the Berne Convention requires a unanimous vote, which the United States can of course act upon individually if the revision were to degrade the traditional high level of Berne protection.

F. Berne adherence is essential to bolster the U.S. position in trade negotiations bilaterally and for a GATT Intellectual Property Code.

United States negotiators attempting to raise the level of intellectual property protection in developing countries throughout the world find that their bargaining position is undercut when they seek to persuade such countries to institute high levels of copyright protection. We are asked, if the United States is sincere in urging Berne levels of protection throughout the world, why have we not joined Berne?

Indeed, as Ambassador Clayton Yeutter reported to this Subcommittee in his testimony on February 18, 1988, we repeatedly heard this question raised in recent bilateral negotiations with Singapore and Korea -- substantial players in international trade.

Similarly, when we urge in our GATT negotiations that an Intellectual Property Code should be adopted to provide dispute settlement and enforcement mechanisms for Berne standards of copyright protection, we are met with the same charges of hypocrisy. And the charges may be more justified now if we refuse to join Berne when adherence is now a realistic possibility, as a result of the changes made in our copyright law by the 1976 Copyright Act.

A GATT Intellectual Property Code is not a substitute for Berne membership. Rather, it would provide enforcement and dispute resolution mechanisms founded on the fundamental principles of protection embodied in the Berne Convention. Both are needed.

III. CONGRESS SHOULD FOLLOW THE "MINIMALIST" APPROACH TO BERNE ADHERENCE.

A. Congress should make only those few changes in U.S. law that are necessary to comply with Berne.

IBM agrees with Senator Leahy and Senator Hatch that we should follow the "minimalist" approach to Berne adherence, making only those few changes in U.S. law that are necessary to comply with Berne. For example, Berne adherence need have no significant effect on our valuable system of registration and deposit.

The general registration provision of section 408 is essentially compatible with Berne, because it is permissive, not mandatory, and is not a condition for the enjoyment or exercise of copyright rights. The valuable incentives to registration in section 410(c) (prima facie evidence) and section 412 (statutory damages and attorney's fees) are clearly also compatible. Similarly, Berne compatibility requires no change in our valuable national library system, since the mandatory deposit provisions in section 407 are enforced through fines, not through limitations on copyright.

The few changes that are necessary, however, include the elimination of the few remaining "formalities" (as Berne uses the term) in U.S. law. Under Article 5(2) of the Convention, "the enjoyment and the exercise" of authors' rights cannot be subjected to "formalities." This means that there cannot be formal conditions for copyright rights to come into existence. By adopting the principle that a copyright in a work "subsists from its creation," the 1976 Copyright Act already fully complies with this requirement.

But Article 5(2) also means that there cannot be formal conditions for "the enjoyment and the exercise" of the rights of copyright after they come into existence. Mandatory notice under sections 401 and 402 is incompatible with this prohibition because a failure to perform the "formality" -- the affixing of proper notice to published copies -- results in loss of copyright.

B. Moral rights has not been an issue for IBM, and we do not foresee it as one.

Under the "minimalist" approach, a prime example of a subject that does not have to be addressed in the enabling legislation is the moral rights "issue."

At the beginning of my statement, I described generally the kinds of copyrighted works that IBM creates, or acquires, and then disseminates. It is relevant to the moral rights "issue" that a significant number of the computer programs we market are acquired in whole or in part from others. We acquire rights in programs from other companies, and we acquire rights from individuals.

We publish a number of magazines and periodicals, many of which contain material from writers who are not IBM employees; we produce many audiovisual and educational materials; and we spend many millions of dollars each year in advertising. For these materials and for this advertising, we acquire rights from a wide range of writers, artists, photographers, composers, moviemakers and other creative persons.

These materials are of course revised and rewritten under intense deadline pressures. We use hundreds of free-lance writers and contributors for our textbooks, whose chapters, photographs and graphics we edit not only from first draft to publication, but also from one edition to another. We have long produced these many copyrighted materials throughout the world, in countries with strict moral rights laws such as France and in others without such laws.

We publish the creative work product of individuals who may be scientists (some of them Nobel Prize winners), engineers, university professors, well-known programmers, creative artists, photographers, composers and many others. If one of our publications -- such as Think, the IBM Research and Development Journal, or the IBM Systems Journal -- were to mangle the editing of an article, I am sure that the wrath of the contributor would be visited upon us just as upon any other publisher.

IBM would have to foot the bill, directly or indirectly, if there were claims for any moral rights violations by any of the persons from whom we acquire rights. If these claims were significant (either individually or cumulatively), we would be concerned; but they are not, and we are not. And if Berne adherence had anything to do with making these claims significant, we would be even more concerned. But, again, we are not.

In short, we have as much at stake in the area of moral rights legislation as anyone else in the publishing or other copyright industries. We are not claiming the benefits of Berne while expecting others to suffer risks. Were there such risks, they would apply to us as well. We are convinced that there are no such risks, however, and that the level of moral rights legislation in the United States will not be affected by the adoption of Berne.

C. Berne adherence requires no change in Federal or State law as a result of Article 6bis.

We are convinced, after thorough analysis, that the current protection of "moral rights" in the United States is compatible with Article 6bis of the Berne Convention, and that adherence to Berne will require no change, directly or indirectly, in Federal or State statutory or common law as a result of that provision. IBM agrees on that point with Chairman Kastenmeier, Register of Copyrights Ralph Oman, and the Administration witnesses in their testimony before you on February 18; former Register of Copyrights Barbara Ringer in her testimony on February 10 before Chairman Kastenmeier's Subcommittee; the Ad Hoc Working Group; Dr. Arpad Bogsch, the Director General of the World Intellectual Property Organization; and an impressive number of other commentators and authorities who have carefully examined the matter.

United States statutory and common law currently provides rights which are similar or equivalent to the so-called rights of authorship and integrity identified in Article 6bis(1). For example, under the Copyright Act itself, §106(2) grants authors the exclusive right to prepare "derivative works"; §115(a)(2), the specific right to object to distortions under the compulsory record license; §203, the right of termination of transfers and licenses; and under §106(1) and (3), clearly authors also possess the right of first publication. The Lanham Act protects authors against false designation of the origin of their works. Under state common law doctrines, contracts governing the transfer or license of copyrights are subject to an implied covenant of good faith, the obligations of agents to their principals, and proscriptions of fraud and misrepresentation; names and reputations are protected under laws of defamation and privacy; and at least four states currently recognize a statutory "right of integrity" for works of fine art.

These American provisions and principles provide protection which already complies with Article 6bis, even though they don't "add up," like so many pieces of a jigsaw puzzle, to an equivalent of the French _droit moral_. Given the absence of "moral rights" protection in many of the 76 Berne nations, as well as the lack of uniformity among those members that do have such laws, it is clearly a mistake to assume that Article 6bis requires that Berne members must have something that is the equivalent of French law. And of course Berne imposes no obligation to conform to French law.

Quite the contrary, Article 6bis(3) by its own terms refers the question of "means of redress" to the "legislation" of each member country. French law is only one extreme; most of the 75 other members' laws fall well short of it. Thus, current American law is well within the acceptable spectrum of "moral rights" alternatives. That Article 6bis does not even use the term "moral rights" is consistent with its neutrality regarding the vastly different legal traditions of its members concerning this subject.

Indeed, there is rather less to Article 6bis than meets the eye -- less than "moral rights" advocates might hope for or the opponents fear. For several reasons, the applicability and practical effect of Article 6bis would be limited even if Berne were self-executing or Congress were to enact Article 6bis directly into law, and even if it stood for something like a direct "right of integrity" as under French law.

By its own terms, Article 6bis applies only to "authors" and to those who share in the initial copyright. The Berne Convention does not prohibit treatment of works as "works made for hire." When an employee creates a "work made for hire," or when someone complies with the "work made for hire" requirements of §101 for commissioned works in the United States, the employer or commissioning party would be an "author" for the purposes of Article 6bis. Consequently, many of the situations in which "moral rights" principles are typically invoked are not even touched by Article 6bis.

For example, since few (if any) of the directors of Hollywood black-and-white movies were ever the copyright owners, the "colorization" controversy would not be affected by Article 6bis. Similarly, anonymous magazine writers are typically employees, and hence none is an "author" for these purposes.

Article 6bis does not bar the transfer or waiver of moral rights.[2] So, even if Article 6bis were somehow misconstrued to require the French "right of integrity," Article 6bis would mean little effective change in American law, since moral rights questions would continue to be governed by contract law, which permits full transfer or waiver of moral rights.

Moreover, under Article 5(3) of Berne, even if a court were to claim that Berne is self-executing -- and, as I shall discuss, it is not -- the effect of Article 6bis in the United States would be only on works of foreign origin, not on any domestic works. Article 5(1) requires that protection be extended to authors in countries other than their own, and Article 5(2) and 5(3) make clear protection of domestic works is otherwise governed by domestic law.

Berne's opponents nonetheless claim that American courts will freely disregard the grounds for concluding that

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[2] As part of my testimony, I attach as Appendix A a report on "Transfer or Waiver of Moral Rights under the Berne Convention," prepared by our attorneys.

American law complies with Article 6bis. Instead, they warn, courts will interpret Article 6bis to enlarge "moral rights" protection and to permit authors to file new private claims based directly on rights of "authorship" and "integrity." However, these alarms are false, for reasons that include the following:

First, Berne is not a self-executing treaty in the United States. It would not permit a litigant to rely directly on Berne instead of U.S. law. Even if Berne were ratified without further clarification (i.e., by the Senate in its ratification, and by the entire Congress in the enabling legislation), the language and subject matter of Berne are such that, under existing case law, Berne would not be self-executing. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298-9 (3d Cir. 1979); United States v. Postal, 589 F.2d 862, 877 (5th Cir. 1979).

Second, nothing in Berne requires the United States to treat it as self-executing. Indeed, Article 36 of the Berne Convention is drafted to accommodate national legal systems that constitutionally reject self-executing treaties.

Third, by means of Congressional "findings," "statements of intent," "declarations" and "rules of construction" in the enabling legislation, such as those proposed in S. 1301 and S. 1971, Congress can assure that Berne will not be self-executing. Hopson v. Kreps, 622 F.2d 1375, 1380

(9th Cir. 1980).[3]

The bills introduced by Senator Leahy (S. 1301) and Senators Hatch and Thurmond (S. 1971) contain several excellent provisions on the non-self-executing character of Berne which, taken together, clear up any possible confusion that might persist on this issue.

Section 2 of S. 1301 contains the following pertinent "findings" and rules of "construction": that Berne is not self-executing [§2(a)(2)]; that U.S. obligations under Berne may be performed only pursuant to domestic law [§2(a)(3)] that, aside from the enabling legislation itself, no further legislation is needed for the U.S. to meet its Berne obligations [§2(a)(4)]; and that any claim under Berne is not to be enforceable directly [§§2(b)(1) and 11(c)(1)] or in any action brought pursuant to Berne itself [§2(b)(2)]. Section 2 of S. 1971 contains provisions virtually identical to each of these [§§2(a)(1) and (2), 2(b)(2) and (3)].

Section 11 of S. 1301 also contains an especially useful elaboration: that rights under Federal and State statutes and the common law "shall not be reduced or expanded" by virtue of Berne's provisions. This provision puts to rest any fear that courts will look directly to Berne or will find implied rights of action on the basis of Berne.

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[3] As part of my testimony, I attach as Appendix B a report on "The Berne Convention and Self-Execution," prepared by our attorneys.

During the hearings in the 99th and 100th Congresses, some who testified would like to see greater protection for moral rights and others would like to see less. Yet a deeper understanding of this question has resulted from the deliberations conducted over the past three years. A consensus has emerged among commentators and members of the copyright community that in this area American law is already compatible with Article 6bis, that no change is needed to adhere to Berne, and that adherence will bring about no change.

In other words, the debate over the moral rights in the context of Berne adherence legislation has been recognized for what it is: in the words of Senator Leahy, a "contentious distraction from the effort to bring the United States into the Berne Convention." We agree with Senator Leahy that "[w]e should make only those changes to our copyright law that are necessary in order to comply with Berne. . . . [W]e should preserve, to the greatest extent possible, the rules and assumptions under which the American copyright community has operated so successfully."

IV. CONCLUSION

For all of these reasons, Mr. Chairman and members of the Subcommittee, IBM strongly supports United States adherence to the Berne Convention. Equally strongly, we believe we should adhere without the enactment of specific moral rights provisions in the enabling legislation.

Appendix A to the Statement of Kenneth W. Dam, Vice President, Law and External Relations, IBM Corporation, before the Subcommittee on Patents, Copyrights and Trademarks, Committee on the Judiciary, United States Senate, 100th Congress, Second Session, on S. 1301 and S. 1971, March 3, 1988.

TRANSFER OR WAIVER OF MORAL RIGHTS UNDER THE BERNE CONVENTION

The Berne Convention leaves to the laws of its member countries the determination whether moral rights may be transferred or waived. As we show below, this conclusion is borne out by the language and history of the Convention itself, the opinions of experts and the practices of Berne member countries.

I. Under the Convention Text and the WIPO Guide, Transfer or Waiver of Moral Rights Is Left to the Laws of Berne Member Countries

Article 6*bis*, paragraph (1) of the 1971 Paris Act of the Berne Convention* provides as follows:

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* Berne Convention for the Protection of Literary and Artistic Works of Sept. 9, 1886, completed at Paris, on May 4, 1896,
Footnote continued

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudical to his honor or reputation.

Although the language "after the transfer of said rights" might suggest that moral rights cannot be transferred or waived,

> literally construed this provision simply means that the transfer of economic rights does not in and of itself include the transfer of moral rights and does not necessarily mean that moral rights themselves are incapable of transfer.

Nimmer, "Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law," 19 Stan. L. Rev. 499, 524 (1967) [hereinafter cited as "Nimmer"]; accord Stewart, S., International Copyright and Neighbouring Rights §4.21 (1983) [hereinafter cited as "Stewart"].

Footnote continued
revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, and revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, effective July 10, 1974, reprinted in 7 Copyright 135 (1971).

The official commentary by the World Intellectual Property Organization ("WIPO"), which serves as the Berne secretariat, indicates that this provision need not be construed to prohibit alienability, and Register of Copyrights Ralph Oman so testified before this Subcommittee on June 17, 1987. Statement of Ralph Oman, Register of Copyrights, before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, 100th Cong., 1st Sess., June 17, 1987, at 40. Indeed, the WIPO commentary concerning Article 6*bis* paragraph (1) states:

> Note that the moral right exists "independently of the author's economic rights" and even "after the transfer of the said rights". This protects the author against himself and stops entrepreneurs from turning the moral right into an immoral one. *Indeed some laws expressly lay down that the moral right cannot be assigned and that the author may not waive it. However, on this point, too, the courts have some freedom of action*.

WIPO, *Guide to the Berne Convention For the Protection of Literary Works (Paris Act, 1971)* (1978) [hereinafter cited as "*WIPO Guide*"] at 42 (emphasis added). Thus, it seems clear that the Berne Convention contains no strict prohibition against transfer or waiver of moral rights, else the statement that courts "have some freedom of action" has little meaning.

Moreover, the legislative history of Article 6bis, paragraph (1) provides persuasive evidence that the Convention does not prohibit transfer or waiver of moral rights. According to E. Piola Caselli, the Rapporteur General of the 1928 Rome Conference (at which Article 6bis was first adopted), the terms of paragraph (1) mean that the moral rights are not automatically transferred with economic rights, not that they are incapable of transfer. Nimmer, *supra* at 524 (citing Caselli, *Correspondance*, 1935 *Le Droit D'Auteur* 67).

Caselli's report of the Conference confirms that in adopting the provision, the Conference intended to leave the issue of transfer or waiver of moral rights to the laws of its individual member countries. *Id*. (citing Bureau De L'Union Internationale Pour La Protection Des Oeuvres Litteraires et Artistiques ("BIRPI"), Actes de la Conference Reunie a Rome du 7 Mai au 2 Juin 1928, at 202 (1929)). Finally, at the Brussels Conference in 1948, France offered a proposal to make moral rights inalienable. That proposal was rejected. *Id*. (citing BIRPI, Documents de la Conference Reunie a Bruxelles du 5 au 25 Juin 1948 (1951) at 97). *Accord* Stewart, *supra* at §4.21.

Finally, the freedom of action allowed to individual member countries in enforcing moral rights generally is reflected throughout the balance of Article 6bis. Paragraph (2) provides as follows:

> The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

The Brussels Act of the Berne Convention (1948) provided for moral rights of the author "during his lifetime." This was changed in the Stockholm (1967)* and Paris (1971) texts to provide for moral rights protection "at least until the expiry of the economic rights." Article 6bis, paragraph (2) reflects a compromise under which countries whose laws do not provide for moral rights protection after the author's death at the time of their accession to Berne may provide that some of these rights may cease to be maintained after the author's death. The WIPO commentary concerning this provision states:

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* Note that, for reasons not relevant here, the substantive provisions of the Stockholm Act never came into effect.

> This provision takes account of the practice of member countries with an Anglo-Saxon legal tradition, according to which the protection of the moral right is mainly a matter for the common law, and, in particular the law of defamation. This does not normally permit the bringing of an action after the death of the person defamed.*

WIPO Guide at 44.

Article 6bis, paragraph (3) also illustrates the latitude given to individual countries and their courts in the area of moral rights:

> The means of redress for safeguarding the rights ~~granted by~~ this Article shall be governed by the legislation of the country where protection is claimed.

Thus, the member countries of Berne would appear to have complete discretion over the means of redress of violations of moral rights.

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* As this passage clearly illustrates, in the view of WIPO -- the secretariat of the Berne Union -- the Convention does not require statutory enactment of specific moral rights provisions. See WIPO, Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967, Vol. II, Report on the Work of Main Committee I, at ¶15 ("the adoption of English as one of the official languages of the Berne Convention. . . makes it necessary to clarify an expression appearing several times in text: 'legislation nationale' ('national legislation'). According to the English view, which was adopted by the Drafting Committee, these words refer not only to statute law but also to common law.").

II. According to Distinguished Copyright Experts and Commentators, the Berne Convention Does Not Prohibit Transfer or Waiver of Moral Rights, But Leaves Those Questions to Member Countries

The laws of some countries, such as France, state that moral rights are "inalienable." These laws reflect a view that moral rights are uniquely related to the author's personality, honor, and reputation. See, e.g., DaSilva, "Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States," 28 Bull. Copyright Soc'y U.S.A. 1, 11-12 (1980) [hereinafter cited as "DaSilva"]; Sarraute, R., "Current Theory on the Moral Right of Authors and Artists Under French Law," 16 Am. J. Comp. L. 465 (1968). They attempt to protect authors out of a concern that authors may have inferior bargaining power, and if moral rights can be transferred or waived, authors will be forced to yield their rights to publishers. Merryman, "The Refrigerator of Bernard Buffet," 27 Hastings L. J. 1023, 1044 (1976). However, this paternalistic view of authors is not universally shared (or implemented). For instance, P. Recht, a French critic of the inalienability doctrine, states:

> Must we always consider authors to be nursery school children? I ask, like Monsieur Lyon-Caen: "Why should we treat authors like minors, and defend them against acts permitted to every other person, regarding every other type of property and every other type of rights."

DaSilva, supra at 29 (quoting P. Recht, Le Droit D'Auteur, Une Nouvelle Forme de Propriete, at 291).

Preventing authors from entering binding contractual arrangements regarding modifications to their work (as would be the case if moral rights could not at least be waived) could significantly impair commercial flexibility and make publishers unwilling to invest in works which may require modification to be marketed effectively.

> This would not only have the result of restricting the market for artistic works in general, but would especially harm those authors who are more than willing to allow changes to be made in their work to render them marketable. The consequence to the public at large would be a reduced access to intellectual and artistic works.

Comment, "Protection of Artistic Integrity: Gilliam v. American Broadcasting Companies," 90 Harv. L. Rev. 473, 479 (1976). It is these considerations -- the need for and desirability of commercial flexibility -- which have led many Berne countries to permit transfer or waiver of moral rights, and others to be flexible in their application of the doctrine. Id. at 480 n.45; see Kwall, R., "Copyright and the Moral Right: Is an American Marriage Possible?", 38 Vand. L. Rev. 1, 13 & n.48 (1985) [hereinafter cited as "Kwall"].

Countries which permit transfer or waiver of moral rights* in no way violate a Berne obligation in doing so. According to numerous commentators, the Berne Convention does not prohibit transfer or waiver of moral rights. See, e.g., DaSilva, supra at 16 (citing P. Recht, supra at 285) ("the Berne Convention ignores the inalienability rule altogether"); Kwall, supra at 12 n.45 & 13 n.48 (the fears expressed at one time by the motion picture and television industries concerning moral rights in the context of U.S. adherence to Berne are "diminished by the failure of Article 6bis to incorporate the requirement of inalienability, and by the practice of countries such as France, where the moral right supposedly is inalienable, to respect the interests of those who adapt creative works"); M. Nimmer & D. Nimmer, Nimmer on Copyright §8.21[A] (1987) ("not all countries which adhere to the doctrine regard [moral rights] as inalienable and the Berne Convention does not require such inalienability").

That Berne does not require inalienability of moral rights was confirmed by R. Plaisant, Professor at the University of Le Mans in France, at an address on moral rights at a conference last year to celebrate the centenary of the

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* See part III, infra.

Berne Convention. Plaisant, R., "Droit de Suite and Droit Moral under the Berne Convention," 11 Colum.-VLA J. Law & Arts 157 (1986) [hereinafter cited as "Plaisant"].

In comparing the moral rights provisions of Berne with those of French law, Professor Plaisant made the following observations:

> The right of paternity is acknowledged in both the [Berne] Convention and French law but in France this right is inalienable which makes the effect of renunciation of the right uncertain.
>
> ... The right to respect is also acknowledged in both but in French law the inalienability of the right is narrowly applied in practice.
>
> ... The main point is the inalienability of the right, which French law is almost alone in declaring, although in practice it is applied with caution.

Id. at 162.

III. The Varying Laws of Berne Countries Illustrate the National Discretion the Convention Permits as to Transfer or Waiver of Moral Rights

The different laws and practices among Berne countries with regard to transfer or waiver of moral rights illustrate the fact that the Convention leaves this issue to the discretion of its individual members. Many Berne countries do permit transfer or waiver of moral rights. See generally UNESCO, Study of Comparative Copyright Law: Moral Rights, 12:4

Copyright Bull. 39, 53-55 (1978). We discuss below examples of a few such countries.*

Canada

The proposed revision to the Canadian copyright law illustrates the fact that Canada does not view the Convention as prohibiting waiver of moral rights. Canada is currently in the process of legislating to amend its copyright law in numerous respects. In support of that effort, the Canadian government has done many studies and reports over the last several years which address various aspects of the Canadian copyright law, including moral rights.

Barry Torno, in Ownership of Copyright in Canada (1981) -- one of the series of copyright revision studies prepared in the Canadian revision effort -- examined the moral rights provision initially adopted as part of the 1928 Rome Text of the Berne Convention.** He concluded that "inalienability of moral rights is not an obligation under the Rome Text; rather, it is optional." *Id.* at 72.

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* The countries mentioned here are merely a few examples; they are by no means intended to be--- nor are they -- a comprehensive list of all Berne countries refusing to bar transfer or waiver. It should be noted that even those countries whose copyright laws state that moral rights may not be transferred or waived frequently permit waiver in some circumstances. *See, e.g.,* Strauss, W., The Moral Right of the Author, Copyright Revision Study No. 4 at 123-24 (1959), *reprinted in* Copyright Soc'y of U.S.A., Studies on Copyright, Vol. II (Arthur Fisher memorial ed. 1963) at 963.

** As Torno notes, Article 6*bis*(1) "remains little changed in the 1971 Paris text." *Id.* at 72.

After reviewing the literature and practices of other Berne countries, Torno concluded further that "it would appear that Canada may decide for itself whether or not to make the moral rights established by §12(7) [of the Canadian copyright law] alienable." Id. at 73. Mr. Torno recommended that the revised Canadian Copyright Act

> provide that the authority to alter protected works may be contractually granted (i.e., moral rights, like pecuniary rights, may be fully assigned, licensed, etc.) during an author's lifetime. The Act should complement this with the provision that the author is presumed to retain all such moral rights as are not specifically assigned.

Id. at 76.

A draft bill is currently under consideration in the Canadian Parliament. Bill C-60, "An Act to Amend the Copyright Act and to Amend Other Acts in Consequence Thereof," The House of Commons of Canada, 33rd Parliament, 2d Sess., 35-36 Elizabeth II, 1986-87. Section 12.1(2) of the draft bill provides as follows:

> Moral rights may not be assigned but the author of a work may waive the rights or any of them.

Section 12.1(4) also states that:

> Where a waiver of any moral right is made in favour of an owner or licensee of

> copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver.

United Kingdom

The United Kingdom similarly does not perceive the Berne Convention to prohibit waiver of moral rights. The draft bill to amend the Copyright Law in the United Kingdom, introduced in October 1987, contains the following provisions:

> (1) It is not an infringement of any of the rights conferred by this Chapter ["Moral Rights"] to do any act to which the person entitled to the right has consented.
>
> (2) Any of those rights may be waived by instrument in writing signed by the person giving up the right.
>
> (3) A waiver--
>
> (a) may relate to a specific work, to works of a specified description or to works generally, and may relate to existing or future works, and
>
> (b) may be conditional or unconditional and may be expressed to be subject to revocation;
>
> and if made in favour of the owner or prospective owner of the copyright in the work or works to which it relates, it shall be presumed to extend to his licensees and successors in title unless a contrary intention is expressed.
>
> (4) Nothing in this Chapter shall be construed as excluding the operation of the general law of contract or estoppel in relation to an informal waiver or other transaction in relation to any of the rights mentioned in subsection (1).

H.L. Bill 12, "Copyright, Designs and Patents," §77, introduced in the House of Lords, October 28, 1987.

The legislative history of the bill indicates a view that the terms of Article 6bis(1) of the Berne Convention mean that the moral rights of the author do not automatically transfer with a transfer of the economic rights. Copyright and Designs Law, Report of the Committee to Consider the Law on Copyright and Designs (1977) ("Whitford Committee Report"), para. 51. It also indicates approval of the "general philosophy" of the approach taken by the Netherlands copyright law (see infra) -- in particular, the provisions of that law which provide for waiver of certain moral rights. Whitford Committee Report, para. 56.

The Netherlands

As noted by the Whitford Committee, The Netherlands permits an author to waive at least some of his moral rights. Its copyright law provides in pertinent part:

> Even after transfer of his copyright, the author of a work shall have the following rights:
>
> (a) the right to object to publication of the work under a name other than his own, as well as any alteration of the name of the work or the indication of the author, if such name or indication appears on or in the work or has been made public in conjunction with the work;

> (b) the right to object to any other modification of the work, except where the nature of the modification is such that it would be unreasonable to object to it;
>
> (c) the right to object to any distortion, mutilation or other modification of the work which would be prejudicial to the honor or reputation of the author or to his value as such.
>
> . . .
>
> The rights referred to under (a) and (b) above may be transferred when modifications are to be made to the work or to its name.

Art. 25, Law Concerning the New Regulation of Copyright (1912), as amended, reprinted in UNESCO, Copyright Laws & Treaties of the World (1984).

Sweden

The copyright law of Sweden provides that an author may waive his moral rights with regard to specified uses of his work:

> When copies of a work are produced, or when it is made available to the public, the name of the author shall be stated to the extent and in the manner required by proper usage.
>
> A work may not be changed in a manner which is prejudicial to the author's literary or artistic reputation, or to his individuality; nor may it be made available to the public in such a form or context as to prejudice the author in the manner stated.

> The author may with binding effect only waive his right under this section in regard to clearly specified uses of the work.

§3, Law No. 729 of 1960 on Copyright in Literary and Artistic Works, as amended, reprinted in Copyright Laws and Treaties of the World, supra.

France

Under French law, the moral right is stated to be "perpetual, inalienable and imprescriptible." Law No. 57-298 on Literary and Artistic Property, Mar. 11, 1957, Art. 6, reprinted in Copyright Laws & Treaties of the World, supra. Nevertheless, as many commentators have observed, even in France the doctrine of inalienability of moral rights is "riddled with exceptions." DaSilva, supra at 16; Treece, J., "American Law Analogues of The Author's 'Moral Right,'" 16 Am. J. Comp. Law 487, 505-06 (1968); Strauss, supra at 123.

In fact, French courts tend to enforce contracts permitting reasonable alterations of an author's work, particularly with respect to adaptations. See, e.g., Amarnick, P., "American Recognition of the Moral Right: Issues and Options," 29 ASCAP Copyright Law Symposium 31, 47-48 (1983); Merryman, supra at 1044-45; DaSilva, supra at 16. The right of paternity is waivable if the waiver is expressed in writing and limited. See, e.g., Gargat v. Ste An. Etablissements Lohac, Court of Appeal of Paris, March 18, 1971; International Labour Organisation, "The Protection of Salaried Authors and Inventors (Geneva, 1987) at 67 (salaried authors in France may, in contracts with their employers, waive their right to be named or authorize a third person to sign on their behalf, and courts recognize the validity of this procedure). Moreover, it presumed by law that the author of a contribution to a collective work relinquishes his author's rights in his contribution as part of the collective work, and that those rights vest in the editor of the collective work. (Art. 13) Similar provisions exist for films. (Art. 14, 15, 16).* See DaSilva, supra at 16.

In his recent address, Professor Plaisant explained that "French and Italian law give the droit moral more extensive scope than provided for in other countries, whilst applying the concept of inalienability cautiously." Plaisant, supra at 163.

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* As one commentator has noted, the French experience "illustrates the inherent infeasibility of a truly inalienable moral right." Kwall, supra at 13.

CONCLUSION

It is clear from

- the language of Article 6bis of the Berne Convention, and its legislative history;
- the opinions of copyright experts; and
- the varying practices of Berne members

that the Berne Convention leaves to its individual member countries the determination whether moral rights may be transferred or waived.

Appendix B to the Statement of Kenneth W. Dam, Vice President, Law and External Relations, IBM Corporation, before the Subcommittee on Patents, Copyrights and Trademarks, Committee on the Judiciary, United States Senate, 100th Congress, Second Session, on S. 1301 and S. 1971, March 3, 1988.

THE BERNE CONVENTION AND SELF-EXECUTION

I. The Berne Convention Does Not Require Self-Execution

On its face, the Berne Convention imposes no requirement that it be self-executing for member countries. To the contrary, Article 36(1) provides that a Berne member "undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention."

As the WIPO Guide explains: "What those measures are depends on the constitution of the country in question: in some it becomes part of the law of the land; in others parliament must pass laws to give effect to the Convention's obligations."

WIPO, Guide to the Berne Convention for the Protection of Literary Works (Paris Act, 1971) (1978), §36.2 at 141. Thus, "in countries according to the constitution of which treaties were self-executing, no separate legislation was necessary to implement those provisions of the Convention which, by their nature, were susceptible of direct application." Id., §36.5 at 141.

As Professor Henkin points out, "[i]n Western parliamentary systems, generally, treaties are only international obligations, without effect as domestic law; it is for the parliament to translate them into law, or to enact any domestic legislation necessary to carry out the obligations." Louis Henkin, Foreign Affairs and the Constitution (1972), at 156. It has long been the common understanding that a treaty "is in its nature a contract between two nations, not a legislative act." Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829), overruled on other grounds, United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833). A commentator explains:

> A treaty is a contract, not law. It lays down rules for the parties, and these should be promulgated to the individual before he should be bound by them. Hence, many countries have a rule that treaties must be legislated upon to be internally operative. Even when they have no such rules their courts can only apply the treaty as law when it was the intention of the signatories that it should be internally operative. There is a distinction between treaties which are self-executing, i.e., intended to

> bind States internally, and those which are non-self executing, i.e., intended to bind them externally . . . .
>
> Hence, two streams of judicial authority are to be distinguished. The first is to be found in States which require the legislative incorporation of treaties in municipal law before they can be internally operative, and the second is to be found in States which have no such constitutional requirement. In the first stream no distinction need be made between self-executing and non-self-executing treaties because it is the legislation and not the intentions of the parties that creates municipal law; in the second the distinction is vital because there is no criterion but the intentions of the parties for determining that the treaty has become municipal law.

D. P. O'Connell, International Law (2d ed.) I (1970), at 54-55 [hereinafter cited as "O'Connell"].

II. Berne Members, Under Their Own National Systems, Make a Variety of Decisions as to Adoption of the Convention as Self-Executing or Not

The United Kingdom is the most important and most obvious example of a nation in which, with a very limited class of exceptions, no treaty is "self-executing."* McNair, The Law of Treaties (1961), at 81 [hereinafter cited as "McNair"]; see also United States v. Postal, 589 F.2d 862, 878n.24 (5th Cir.), cert denied, 444 U.S. 832 (1979). Although a non-self-executing treaty is internationally binding on the United Kingdom, a court may not give it "municipal" effect without parliamentary sanction. McNair, supra, at 82; Kate Holloway, Modern Trends In Treaty Law (1967), at 293 [hereinafter cited as "Holloway"].

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* The exceptions involve cases affecting the rights of belligerents and relating to diplomatic immunities. McNair, The Law of Treaties (1961), at 89-93.

Historically, the rule in the United Kingdom goes back to constitutional divisions over 300 years ago between the Crown and Parliament, and between the executive prerogative and the legislative power:

> Matters of State connected with foreign policy were within the province of the Council, not of Parliament, and the asserted incapacity of the Executive to legislate for its subjects by treaty was a manifestation of the constitutional struggle concerning the prerogative.

O'Connell, supra, at 59.

Explicit sanction by Parliament is therefore necessary whenever a treaty requires for its execution and application in the United Kingdom "a change in or addition to the law administered in the courts" or a grant of additional power to the government, or wherever a treaty imposes a "direct or contingent financial obligation" upon the United Kingdom. McNair, supra, at 83-85, 93-94;

Holloway, supra, at 291. Legislation to give effect to a treaty may either incorporate the treaty directly into English law or translate its terms into English law. Holloway, supra, at 292. Typically, the government in modern Britain will seek legislative approval before a treaty is formally ratified. Id. at 191-192.

It is interesting to note that although the United Kingdom adhered to the Brussels Act (1948) of the Berne Convention in 1957, Parliament now has a bill before it to enact a moral right. H.L. Bill 12, "Copyright, Designs and Patents," introduced in the House of Lords October 28, 1987. Thus, it is clear that the Convention is not self-executing in the United Kingdom: such a statutory provision would of course be surplusage if the Convention were self-executing.

Indeed, the United Kingdom has been cited by Dr. Arpad Bogsch, the Director General of the World Intellectual Property Organization, as a prime example of countries which do not view Berne as self-executing:

> It is to be noted -- and this is well known in legal circles -- that the United Kingdom, to mention only one example, does not consider the Berne Convention "self-executing" in the sense that one could rely on the provisions of the Berne Convention in any court proceeding in the United Kingdom. Parties before United Kingdom courts can

> only rely on the U.K. statutes and the
> common law of the United Kingdom.

Letter from Dr. Arpad Bogsch to Irwin Karp (June 16, 1987) (reproduced with the statement of the National Committee for the Berne Convention).

Outside the U.K. and the Commonwealth, there are many different national positions on whether, or under what circumstances, a treaty may be self-executing. As one would expect, these variations reflect vastly different constitutional histories and apportionments of executive and legislative power, as well as an endless parade of historical upheavals and accidents.

Under the law of Switzerland, a treaty is automatically incorporated into the domestic law and treated as self-executing. Holloway, supra, at 296. In Germany, the Basic Law (Article 59) vests treaty-making power in the Federal President, but requires "in the form of federal law, the approval or participation" of the legislative body responsible for the affected subject. This has been construed to require approval of treaties by the legislature as a precondition of ratification by the President. Id. at 184. Norway resembles Great Britain, and enabling legislation typically is sought prior to ratification. Id. at 188. In

Belgium, treaties of "alliance" may be self-executing; treaties of "commerce" involving the national finances or imposing financial burdens upon the Belgians individually require consent of the Chamber; and treaties involving territorial changes require explicit legislation. _Id_. at 153. In France and the Netherlands, some treaties are self-executing, while others are not. O'Connell, _supra_, at 67; Holloway, _supra_, at 270-271. Throughout the rest of the world, there are numerous other answers to the question of whether, or under what circumstances, a treaty automatically enters a country's "municipal" law.*

As with many other multilateral conventions written in the nineteenth and twentieth centuries, the Berne Convention was drafted to accommodate the variety of national constitutional doctrines for or against self-execution. As O'Connell explains, "[i]n the nineteenth century it was the practice to incorporate in multilateral conventions only an obligation on the parties to propose measures of internal sanctions to the legislature. More recently, however, the tendency has been to incorporate therein the obligation to enact the necessary legislation." O'Connell, _supra_, at 56.** Neither approach, however, makes a convention self-executing as to a country whose constitution or laws are to the contrary.

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* _See generally_ Holloway, _supra_, at 151-322.

** O'Connell cites numerous examples of each "practice" or "tendency." O'Connell's examples of the nineteenth
Footnote continued

III. Under the Law of the United States, the Berne Convention Would Not Be Self-Executing

The 1971 Paris Text of Berne is only one example of the more recent tendency for conventions to provide that the obligations of members are implemented by the enactment of domestic legislation. Other examples, especially noteworthy, are Articles 27 through 29 of the 1958 High Seas Convention. Each Article begins with the preamble, "Every State shall take the necessary legislative measures to ...."

According to the Fifth Circuit in United States v. Postal, supra, "[s]uch provisions are uniformly declared executory ..." and thus "cannot affect certain subject

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Footnote continued
century practice are: the General Act of the Anti-Slavery Conference of Brussels, 1890, Arts. 5, 12; the North Sea Fishery Convention, 1882, Art. 35; the Submarine Telegraph Convention, 1884, Art. 12; the Tenth Hague Convention, 1907, Art. 21; and the Brussels Convention on Collisions at Sea, 1910, Arts. 9, 121. O'Connell, supra, at 56 n.63. His examples of the more recent tendency are: the Dangerous Drugs Convention, 1936, Arts. 2, 3; the Narcotics Convention, 1961, Art. 36; the Civil Aviation Convention, 1944, Art. 12; the Genocide Convention, 1948, Art 5; the Red Cross Conventions, 1949, Arts. 49, 50, 129, 146; and the High Seas Convention, 1958, Art. 27.

matters without implementing legislation." 589 F.2d at 876-877. As noted above, the Berne Convention in Article 36 contains similar "executory" language.

As the Court in Postal also points out concerning the non-self-executing effect of the merely declaratory language in Article 6 of the High Seas Convention:

> The Convention on the High Seas is a multilateral treaty which has been ratified by over fifty nations, some of which do not recognize treaties as self-executing. It is difficult therefore to ascribe to the language of the treaty any common intent that the treaty should of its own force operate as the domestic law of the ratifying nations.

Id. at 878. The same considerations, of course, would apply to the American adoption of the Berne Convention -- with its 76 current members. Absent an explicit declaration by Congress at the time of ratification that the Berne Convention would be self-executing, the only fair reading of Postal is that Berne would have no such effect.

In Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979), the court held that there was no private right of action under another significant intellectual property treaty to which the United States adheres, the

Paris Convention for the Protection of Industrial Property.* The court specifically held that the Paris Convention is not self-executing, relying on provisions of that Convention, which state:

> "Every country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to insure the application of this Convention."
>
> * * *
>
> "It is understood that at the time an instrument of ratification or accession is deposited on behalf of a country, such country will be in a position under its domestic law to give effect to the provisions of this Convention."

595 F.2d at 1298-99 (quoting the Paris Convention, art. 17). Article 36 of the Berne Convention contains almost identical provisions.

In effect, Berne leaves the question of self-execution to the United States itself. In testimony before this Subcommittee, Under Secretary of State Allen Wallis stated that "[a]s a matter of policy, the Department of State takes the position that intellectual property treaties should not be self-executing." He pointed out that none of the intellectual property treaties to which the United States has adhered since World War II have been regarded as self-executing. Statement of Allen Wallis, Under Secretary for Economic Affairs, before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee, 100th Cong., 1st Sess., July 23, 1987, at 8-9.

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* Paris Convention for the Protection of Industrial Property of Mar. 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, 53 Stat. 1748, T.S. No. 941.

In the absence of any contemporaneous expression of intent by Congress, United States courts would undertake to examine whether Berne on its own terms "imports a contract" or whether it "addresses itself to the political, not the judicial, department." Foster v. Neilson, supra, 27 U.S. at 314. Even if Congress remains silent on the issue -- and since the issue of self-execution has been raised, there is scant likelihood of this -- the language of Berne itself, the wide assortment of national doctrines on self-execution among Berne's members, and such recent controlling cases as Postal and Mannington Mills, all require the conclusion that Berne would not be self-executing in the United States.

IV. By A Statement of Its Legislative Intent, Congress Can Ensure That Berne Is Not Self-Executing

Of course, the foregoing analysis becomes necessary only when the language of the treaty and the normal legislative history surrounding it are silent or unclear on the critical question of legislative intent. For with Berne -- as with any treaty -- Congress can simply state its intention that the Convention will not be self-executing, and thereby make it not self-executing. By means of either a Senate "statement of intent"* at the time of ratification or a declaration in the enabling legislation -- or both -- Congress can settle the issue completely and bar reliance directly on Berne if a discrepancy is claimed between Berne and the implementing statute.

The former can be accomplished easily when the Senate acts upon ratification, and provision has already been made for the latter in the pending bills. *See* §§2(a)(2) and (3), 2(b)(1) and 11(c)(1) of S. 1301; §3(1) and (3) of H.R. 1623; §§2(a)(1) and (2), 2(b)(3) of both S. 1971 and H.R. 2962.

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* The Ad Hoc Working Group on U.S. Adherence to the Berne Convention properly insists on the distinction between a "statement of intent" and a "reservation." While a "reservation" would be inconsistent with Article 30 of Berne, a "statement of intent" that Berne is not self-executing would not be a reservation, since Berne leaves that question up to each member. Final Report of the Ad Hoc Working Group on U.S. Adherence to Berne, *reprinted in* 10 Colum.-VLA J. Law & Arts 513 (1986), at 89 (601).

As the Ninth Circuit explained in Hopson v. Kreps, 622 F.2d 1375 (9th Cir. 1980):

> The issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute. The treaty has no independent significance in resolving such issues, but is relevant insofar as it may aid in the proper construction of the statute. Thus, where courts have been persuaded as to the proper interpretation of an implementing statute, that judgment has not been affected by the claim that the reading given the statute was inconsistent with the intent of the parties to the treaty.

622 F.2d at 1380 (citing United States v. Navarre, 173 U.S. 77 (1899); Botiller v. Dominguez, 130 U.S. 238 (1889)).

Another reason why a court may not disregard a legislative instruction to give effect only to the implementing legislation is the principle of "the equality as law of treaties and federal statutes." Henkin, supra, at 163. As Justice Field explained in Whitney v. Robertson, 124 U.S. 190 (1888):

> By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no supreme efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of

> either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

124 U.S. at 194.

Given this rule of lex posterior priori derogat, even in the extreme situation that is not the case here -- namely, where a treaty is self-executing and Congress expressly contradicts the treaty -- a court may not properly continue to apply the treaty as against the subsequent law. As Justice Field went on to explain in Whitney, "whether the complaining nation has just cause of complaint, or our country is justified in its legislation, are not matters for judicial cognizance." The question of whether a breach of treaty obligations is justified "is not confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments...; and...they belong to diplomacy and legislation, and not to the administration of the laws." Id. at 194, 195.

In other words, whatever remedies a foreign litigant might have in an international forum, he may not, even in the circumstances described, have the contradicted treaty applied in American courts.

CONCLUSION

Berne adherence does not pose the extreme situation just described. As indicated, it is entirely consistent with Berne for Congress to insist that Berne will not be self-executing. Even if there were a conflict between a treaty and a subsequent law -- and here there would not be -- American courts will look to the enabling legislation, and not directly to Berne, should any question arise concerning that treaty.

In summary:

(1) The Berne Convention is drafted to accommodate national legal systems which constitutionally reject self-executing treaties.

(2) Even if Berne were ratified without further clarification by Congress on "self-execution," the language and subject matter of Berne are such that, under existing case law, Berne would not be self-executing.

(3) By means of the contemplated Senate statement of intent and the present statements in the enabling legislation, Congress can assure that Berne will not be self-executing.

NATIONAL COMMITTEE FOR THE BERNE CONVENTION
JULY 2, 1987

WHY THE UNITED STATES SHOULD JOIN THE BERNE COPYRIGHT CONVENTION

As of January 1, 198[illegible] the following organizations have subscribed to this Statement:

- ADAPSO (The Computer Software and Services Industry Association)
- American Association of School Administrators
- American Association of University Professors
- American Council on Education
- American Library Association
- ASCAP(American Society of Composers, Authors & Publishers)
- Ashton-Tate Corporation
- Applied Data Research, Inc.
- AAUP (Association of American University Presses)
- Association of Research Libraries
- Autodesk, Inc.
- Baltimore County Schools
- BMI (Broadcast Music, Inc.)
- CBEMA (Computer and Business Equipment Manufacturers Association)
- Comshare, Incorporated
- Council for American Private Education
- The Data Group Corporation
- Deneb Systems, Inc.
- The Walt Disney Company
- Distribution Management Systems Corp.
- Elsevier Science Publishing Company, Inc.
- Gancom, Inc.
- Harcourt Brace Jovanovich Inc.
- Harris Publishing Company
- Hudson Hills Press, Inc.
- I.M.R.S., Inc.
- Integral Business Systems
- Intellectual Property Committee
  - Bristol Meyers Company
  - E.I. Du Pont de Nemours and Company
  - FMC Corporation
  - General Electric Company
  - General Motors Corporation
  - Hewlett-Packard Corporation
  - IBM (International Business Machines) Corporation
  - Johnson & Johnson
  - Merck & Co. Inc.
  - Monsanto Company
  - Pfizer, Inc.
  - Rockwell International
- IIA (Information Industry Association)
- International Reading Association
- IPO (Intellectual Property Owners, Inc.)
- Johns Hopkins University
- Lotus Development Corporation
- Management Science America, Inc. (MSA)
- MPAA(Motion Picture Association of America)
- Music Educators National Conference
- Music Publishers Association of the United States
- National Clearinghouse for Bilingual Education
- National Commission on Libraries and Information Science
- NMPA (National Music Publishers Association)
- NSBA (National School Boards Association)
- Peter Norton Computing
- SESAC Inc.
- Speech Communication Association
- SPSS Inc.
- Supply Tech, Inc.
- TLB, Inc.
- Unitech Software, Inc.
- U.S. Catholic Congress
- United States Council for International Business
- Vanguard Atlantic Ltd.
- ViewPlan, Inc.
- VM Personal Computing, Inc.
- WOS Data Systems, Inc.
- John Wiley & Sons, Inc. Publishers

Summary

The National Committee for the Berne Convention ("NCBC") strongly supports U.S. adherence to Berne to insure effective copyright protection throughout the world for the United States, its authors and its copyright industries. The NCBC believes Congress should enact appropriate implementing legislation — bills are now pending — to permit the U.S. to join Berne.

U.S. Membership in Berne is Necessary to Secure These Essential Benefits:

. . . To obtain and preserve for the U.S. a high level of effective international copyright protection.

. . . To avert possible retaliation against U.S. works by Berne nations who resent our "free ride" on their Convention. If we reject membership at this time, those nations may, for example, restrict their protection for U.S. works, now achieved through the uncertain means of "back door" publication. Berne adherence will also gain protection for the U.S. in 24 additional countries.

. . . To permit the U.S. to participate effectively in the management of Berne and in policy-making in the international copyright community. This participation is essential, since U.S. withdrawal from UNESCO, which administers the UCC, has further deprived the U.S. of an effective voice in international copyright matters.

. . . To strengthen the U.S. trade negotiations for bilateral treaties and for intellectual property protection in the GATT. Only as a Berne member can the U.S. effectively argue for the adoption of Berne's standards of protection in a GATT intellectual property code.

Only Minimal Changes in U.S. Law Are Required

The U.S. can obtain Berne's benefits at minimal cost. Few changes are required in our Copyright Act, because its 1976 revision made U.S. copyright law almost completely compatible with Berne. Indeed, the "jukebox clause" (as applied to foreign composers) is now the only significant substantive provision which is incompatible, and it can be made compatible without damaging the relevant parties' interests.

The "issues" of freedom of expression and moral rights raised by some Berne opponents are in reality non-issues: Berne does not require us to abandon an iota of our freedom, nor need we write any moral rights clause into the Copyright Act to comply with Berne. U.S. protection of moral rights already complies with Berne. U.S. adherence will not change moral rights protection under current U.S. law, because Berne is not self-executing. The only Berne-related changes that would be made in our laws are those few that Congress enacts as part of the implementing legislation before adherence.

In this statement, the National Committee for the Berne Convention ("NCBC")[1] summarizes the reasons why the United States should join the 100 year-old international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention").

Introduction

Congress soon will consider legislation to make the limited revisions of the Copyright Act required for the United States to join the Berne Convention. NCBC believes it imperative that the United States become a member of the Convention in order to insure effective protection of United States literary and dramatic works, films, music, records, computer software, databases, and other copyrighted works in foreign countries, and to obtain other significant benefits for the United States, its authors and its copyright industries.

These benefits, analyzed below, would be obtained at minimal cost. Few changes are required in our Copyright Act. Neither authors nor copyright industries (e.g., film companies, book and music publishers, record companies, broadcasters, and computer software and database producers) will gain or lose rights under the Act. The interests of schools, libraries and other public-sector copyright users will not be affected, because there need be no changes in any portions of our copyright law that protect these users. And the financial cost to the United States for its membership in Berne would be minute.

1. *What is the Berne Convention?*

The Berne Convention is one of the major international treaties that protect intellectual creations. Each member nation of the Convention agrees that its copyright law will provide to works originating in other member countries the rights and high level of protection stipulated by the Convention.

The United States has long been a member of the major international patent and trademark treaty, the Paris Convention for the Protection of Industrial Property, and also belongs to the Universal Copyright Convention (the "UCC") and other international Conventions which protect intellectual property. However, it shares with the Soviet Union the dubious distinction of being the only major copyright nations which have not joined the Berne Convention.[2] Most European nations, the British Commonwealth countries, Japan and other nations that are the principal foreign markets for United States copyrighted works are members of the Berne Convention.

2. *Adequate Foreign Copyright Protection is Essential For U.S. Authors and U.S. Copyright Industries*

United States authors and copyright industries earn billions of dollars annually in foreign countries from the sale and licensing of copyrighted works created by American authors of literature and drama, music, computer software and databases, motion pictures, records, graphic and other works. These earnings, which significantly help to reduce our huge trade deficits, are possible only in those countries that give these American works adequate copyright protection under their laws. Several other countries give only inadequate copyright protection or no protection at all. In those countries, pirate enterprises inflict huge losses on American authors and copyright industries by reproducing their works without permission or payment, and putting the pirated copies into the stream of commerce for both domestic consumption and export into world markets.

The United States obtains varying levels of foreign copyright protection for its authors and copyright industries by entering into bilateral treaties or international Conventions (multinational treaties) such as the Universal Copyright Convention, which require each signatory nation to provide protection to works of the other members.

But Berne is the most effective Convention, because it requires its members to grant many basic rights, including translation, reproduction, public performance, broadcasting, adaptation and arrangement rights. It thus provides the highest level of protection in the major copyright countries which are the largest users and consumers of U.S. copyrighted works.

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[1] NCBC is comprised of organizations representing companies and individuals who create, publish, produce and otherwise disseminate works protected by the Copyright Act, companies engaged in those activities, and organizations representing institutions which use copyrighted works for educational and other public purposes.

[2] The People's Republic of China, which has not until now had a copyright law, currently has one in the draft stage. Based on recent discussions between the U.S. and Chinese copyright officials, Register of Copyrights Ralph Oman has testified that China, "a great nation with a billion users of copyrighted works, is giving serious consideration to Berne adherence."

3. *U.S. Law Requires Only Minimal Change To Make It Compatible With Berne*

Until 1978, the United States did not qualify for membership in the Berne Convention because provisions of our Copyright Act, notably the term of copyright and the "manufacturing clause," were not compatible with provisions of the Convention.

However, the Copyright Revision Act, effective in 1978, was drawn "with a weather eye on Berne" and, as Representative Robert W. Kastenmeier (its principal author and Chairman of the House copyright subcommittee) noted recently, made the U.S. copyright statute almost completely compatible with Berne. A major substantive obstacle was removed when the manufacturing clause expired last year.

Indeed, the only remaining substantive provision of any significance that is incompatible with Berne is the "jukebox clause" as applied to musical compositions of foreign origin. And the bill to implement Berne adherence which Chairman Kastenmeier introduced on behalf of himself and Representative Moorhead (H.R. 1623, 100th Cong.) proposes one possible modification of that compulsory license which would eliminate its incompatibility with Berne without damaging the interests of relevant parties.[3]

* * *

The United States should join the Berne Convention for these reasons:

A. *U.S. Membership in Berne Is Necessary to Obtain and Preserve A High Level of Copyright Protection Abroad For Our Authors and Copyright Industries*

1. *Berne, Not the UCC, Establishes Effective International Copyright Protection*

As Chairman Kastenmeier noted in the statement accompanying his recent Berne implementing bill, the United States has copyright relations with about 100 countries through the UCC and bilateral treaties. But the UCC, with a few exceptions, requires a member nation only to give "national treatment" to the works of other members — the same protection given its own authors, which often is inadequate.

France, Great Britain, Germany, Italy and other Berne countries have adopted the higher standards of protection Berne provides. Because these countries also belong to the UCC, United States authors and copyright industries have had a "free ride" on Berne; U.S. membership in the UCC entitles them to the same high level of protection these countries give their own authors, thanks to Berne.

2. *U.S. Entry Into Berne Will Avert the Risks of Retaliation Against U.S. Works by Berne Nations*

Berne nations cannot but resent our "free ride" on their Convention, through the UCC and the "back door,"[4] and our refusal to share with them the maintenance and administration of the most effective international copyright treaty. Should the United States reject Berne now, especially when it can easily join, some of them may be further provoked to reduce protection for our works by refusing to accept some types of back-door publication, or retaliating against us by restricting protection of U.S. works under Berne Article 6(1).

Their capability to retaliate for U.S. refusal to comply with international copyright standards was vividly demonstrated in 1986 when several Berne members who comprise the European Community threatened to embargo some $500 million of United States products — largely unrelated to copyrighted works — unless the manufacturing clause were allowed to expire on July 1, 1986. Their threat helped kill the clause.

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[3] This statement does not discuss technical incompatibilities such as compulsory copyright notice and mandatory registration. The ultimate choice by Congress in eliminating these incompatibilities between the approaches of H.R. 1623, Senator Leahy's implementing bill (S. 1301, 100th Cong.), and the Administration's implementing bill (H.R. 2962, 100th Cong., introduced by Representative Moorhead on behalf of himself and Representative Fish) is unlikely to be an obstacle to Berne adherence.

[4] This is the practice of qualifying a U.S. work for protection in Berne countries by arranging its "first publication" simultaneously here and in a Berne member country.

3. *U.S. Adherence Will Preserve Berne Protection for U.S. Works in Berne Countries and Gain Protection in 24 More Countries*

Opponents of U.S. adherence to Berne contend that we can remain outside the Convention and continue to obtain its benefits — without paying the minimal price of membership — through the so-called "back door." In making this argument, they recognize the value of Berne protection for U.S. works — as do the many U.S. copyright owners who use the "back door."[5]

But copyright experts who have had to struggle with the intricacies of "simultaneous publication" point out that proving it in foreign courts is often expensive, always burdensome and frequently impossible; the risk of more restrictive interpretation of the theory in some Berne countries increases; and some methods of publicly disseminating works may not even qualify for "back door" treatment.

Indeed, countless authors, composers and artists — as well as small publishers — cannot with their limited means afford even to attempt "simultaneous publication" of their works outside the United States. For them, Berne protection through the "back door" is not an available alternative to protection through Berne adherence

It should also be noted that 24 Berne countries (including Egypt, Romania and Turkey) do not belong to the UCC — another compelling reason for our entry into the Berne Convention. As Chairman Kastenmeier's statement stressed, U.S. adherence to Berne would "gain or clarify or improve our relations with 24 countries . . . with whom our copyright relations are now non-existent, unclear, or otherwise problematic." Copyright relations with those countries are important not merely because of their domestic use of U.S. works but even more so to prevent the export of unauthorized copies throughout the world.

B. *The United States Should Join Berne to Participate Effectively in its Management and in the Making of Policy in the International Copyright Community*

The United States, its Copyright Office and its Congressional Committees always have recognized the importance of Berne decisions to American authors and copyright industries. They attend important Berne meetings and revision conferences, but only in the role of observers with no voice, vote or influence on the Convention's deliberations.

At the outset, one vital consequence of U.S. adherence must be emphasized. Revision of Berne requires a unanimous vote. If the United States is a member, it can veto a decision that would injure its interests. Vide: the United Nations Security Council.

U.S. entry into Berne would give it the right, as a member, to participate effectively in the administration and management of the Convention, rather than hover at its door as a supplicant. A United States voice and vote at Berne are all the more important in this age of new technologies that are reshaping copyright and copyright media, and that have so internationalized the transmission and use of copyrighted works that their protection through an effective international copyright organization is essential. The only such organization is the Berne Convention.

As Senator Leahy emphasized in introducing his Bill to implement Berne adherence (S. 1301, 100th Cong.), "vital American interests can be fully represented in the international copyright system only if we get off the sidelines and onto the playing field, by joining the Berne Convention."

Our participation in Berne is even more essential because of our severely diminished role in UNESCO and the UCC. As Chairman Kastenmeier observed, "the United States has a seat on the committee that oversees the UCC, but, since we withdrew from UNESCO, we have a smaller voice, and no formal vote, in the overall planning and budgeting process affecting UCC-related activities."

Opponents of U.S. adherence to Berne contend that our membership would be of no consequence because revision of Berne requires unanimity; and divisive factors, such as disparities in wealth and cultural differences, make it difficult to reach unanimous decisions. But even if this gloomy picture of Berne politics were accurate, these factors are affirmative reasons for the United States to join Berne and play an active role in its governance.

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[5] Many U.S. publishers and producers of copyrighted works spend substantial amounts each year to "simultaneously publish" their works in a Berne country (frequently Canada) to secure "back-door" protection, although the size of the market in that country may not otherwise justify the expenditure. If the United States joins Berne, they will be entitled to protection without using the "back-door" and will save considerable sums.

There are major copyright problems which many countries (in every camp) have a common need to resolve; predictions about the immutability of copyright positions of several countries have proven wrong; and disruptive factors only emphasize the need for effective leadership. One thing is obvious: the leadership of Berne in furthering copyright can only be strengthened by U.S. membership; it can only be weakened by U.S. refusal to adhere to the Convention. And, as already noted, U.S. failure to adhere costs it the essential veto power.

C. *Adherence to Berne Will Assist U.S. Trade Negotiations*

The United States failure to enter Berne has weakened its negotiating position with countries that are pirate centers. Our membership in Berne would strengthen that position, and could lead other nations with whom our copyright industries have been negotiating to enter the Convention. This view is shared by many in both the public and private sectors who have spent a substantial part of their recent professional careers in negotiating with nations where piracy has flourished. Their reading has consistently been that our entry into Berne will help the United States and industry negotiators obtain improved copyright protection in those jurisdictions.

Indeed, many of these negotiators have indicated that their efforts to obtain more reasonable protection for United States works abroad is handicapped by an inherent hypocrisy: we have so far refused to join Berne, while taking advantage of its benefits and urging other nations to adhere to its standards.

Opponents of Berne adherence contend incorrectly that our entry into Berne would have no direct impact on piracy. But even if their contention were correct, the United States stands to gain much from entering Berne. It stands to lose much from not entering, and it would incur considerable risk of retaliation from Berne members who have the potential for doing us considerable damage.

D. *U.S. Adherence to Berne is Essential to Our Effort to Obtain an Effective High Level of Copyright Protection under the GATT*

Some opponents of adherence have said that the General Agreement on Tariffs and Trade ("GATT") initiative with respect to intellectual property presents an opportunity to develop a new international code of minimum rights, importing from Berne the economic rights but omitting the moral rights. They suggest that the GATT initiative would make Berne superfluous if it succeeds, but they also concede that the initiative will be difficult to complete.

This argument obscures the reality that GATT's effectiveness in this area depends on the level of copyright protection established by the Berne Convention. There is no prospect that GATT members will abandon Berne. There is considerable prospect that United States rejection of Berne membership would cause endless debate within GATT as to the levels of protection to be provided. And without our entry into Berne, a lower level of copyright protection might be the bitter fruit of the GATT initiative.

As Ralph Oman, the Register of Copyrights, has noted: "Only the Berne Convention expressly reflects international copyright norms that industrialized, industrializing and several developing States all accept. Our trade specialists, then, view United States adherence to the Berne Convention as an unequivocal statement of national policy on the material content of international copyright and the kinds of rights that all nations should provide and respect."

Obviously, for the United States to argue effectively for implementing Berne's standards of protection in a GATT code, the U.S. must join Berne. The United States, by far the largest exporter of copyrighted works, has the greatest stake in preserving Berne's higher levels of copyright protection as the standard of GATT protection. We take a great risk in compromising that protection if we refuse to adhere to Berne.

E. *Retroactivity Is Not an Obstacle to U.S. Adherence to Berne*

Under the Berne implementation bills which have been introduced in Congress, the United States would enter the Convention without providing retroactive protection for Berne works now in the U.S. public domain. Opponents of U.S. adherence to Berne contend that failure to grant retroactivity would hamper United States efforts to obtain retroactive protection, through bilateral negotiations, from nations which have denied or given meager protection to United States works.

That contention is without merit. Clearly, if a choice had to be made, U.S. authors and copyright industries would be far better off if we joined Berne, even if a few countries denied retroactive protection to U.S. works. Our primary objective is to obtain adequate protection in those countries prospectively, and Berne adherence will help accomplish that primary objective. It also is possible — and permissible under Berne — for us to negotiate retroactive protection in those countries without granting retroactive protection here to Berne works.

F. *Adherence to Berne Requires No Change in U.S. Law on Moral Rights*

Thus far, the only significant opposition to United States adherence to Berne has come from those few who contend that adherence would, somehow, expand the present scope of protection of authors' "moral rights" in the United States.[6] There is no necessity, however, to insert a moral rights clause in our Copyright Act as a condition for U.S. membership in Berne. Senator Mathias' 1986 Bill (S. 2094, 99th Cong.) did not contain one; S. 1301 does not contain one; and the Administration's bill (H.R. 2962, 100th Cong., introduced by Representative Moorhead on behalf of himself and Representative Fish) does not contain one. H.R. 1623 does contain clauses which grant (and limit) moral rights, but those clauses are not required for Berne adherence.

Three points deserve emphasis.

First, the United States already complies with the Berne minimum requirement for moral rights. Indeed, actual enforcement of moral rights, regardless of labels, under common law and various statutes such as the Lanham Act — frequently invoked to protect authors — is more rigorous in the United States today than it is in a number of Berne countries. Berne permits a wide range of moral rights enforcement; the Convention does not provide any means of redress but leaves that up to each individual member country. The choice by a few Berne countries to expand their moral rights protection beyond the Berne standard in no way obligates the United States to do so.

Significantly, Dr. Arpad Bogsch, Director General of the World Intellectual Property Organization, which administers Berne, has stated that it is unnecessary for the United States to enact statutory provisions on moral rights to comply with Berne. In his letter of June 16, 1987 to the NCBC, a copy of which is attached, Dr. Bogsch states that United States common law and statutes such as section 43(a) of the Lanham Act "contain the necessary law to fulfil any obligation" under Berne to provide moral rights.

Second, U.S. entry into Berne cannot incorporate greater or lesser "moral rights" protection into our law. Under our constitutional law, Berne is not a self-executing treaty, and the only Berne-related changes that can be made in our Copyright Act, other statutes or the common law are those that Congress enacts as part of the Berne implementing legislation. As Dr. Bogsch's letter points out, other Berne countries — the United Kingdom, for example — do not consider Berne to be "self-executing."

Third, in the implementing legislation, Congress can state explicitly that Berne is not self-executing and that Berne does not in any way affect the present state of American law on moral rights.[7]

G. *Adherence to Berne Would in No Way Affect American Freedom of Expression*

Some publishers have expressed "profound concerns about Berne" and anxiety that somehow "Berne is inimical to American principles of freedom of expression" because they fear that Article 17 of Berne upholds censorship by national governments. It does not.

This same provision — in almost the same words — appears in the Pan American Copyright Convention of 1910, to which the United States has adhered for more than 75 years. A similar provision also appears in the 1950 Florence Agreement on the Importation of Educational, Scientific and Cultural Materials, to which we have also long adhered.

The provision in Berne says only that the Convention "cannot in any way affect" the sovereignty of member countries on issues of freedom of expression. The Berne provision has not had any such effect on the many members of Berne who also value freedom of expression; and the similar Pan American and Florence provisions have had no such effect on us.

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[6] Article 6*bis* of the Berne Convention provides in relevant part: "[T]he author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

[7] For example, it can do this, as S. 1301 does specifically, by formal Congressional findings and declarations that: (i) Berne is not self-executing, and Berne and any U.S. obligations under it are to be effective only pursuant to U.S. domestic law and not Berne itself; (ii) any U.S. obligations under Berne are fully met by the implementing legislation without any moral rights changes; and (iii) Berne and the implementing legislation neither reduce nor expand any rights under any other federal or state laws.

WORLD INTELLECTUAL PROPERTY ORGANIZATION

(784)-20
(105)-321

June 16, 1987

Dear Irwin,

You let me know that the National Committee for the Berne Convention wished to hear my views on whether having statutory provisions on "moral rights" was a condition of being in conformity with the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 1971).

In my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6bis of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes. I believe that in the United States the common law and such statutes (Section 43(a) of the Lanham Act) contain the necessary law to fulfill any obligation for the United States under Article 6bis.

There are several countries of the common law system, and among them the United Kingdom (that joined the Berne Convention exactly one hundred years ago), that are bound by the Berne Convention, including its Article 6bis, which have never had and do not have at the present time statutory provisions on moral rights. Such an absence of statutory provisions was, to my knowledge, never regarded by any United Kingdom or foreign court or government as a lack of compliance with the Berne Convention. It is to be noted — and this is well known in legal circles — that the United Kingdom, to mention only one example, does not consider the Berne Convention "self-executing" in the sense that one could rely on the provisions of the Berne Convention in any court proceeding in the United Kingdom. Parties before United Kingdom courts can only rely on the UK statutes and the common law of the United Kingdom.

Sincerely yours,

s/

Arpad Bogsch
Director General

Irwin Karp, Esq.
Attorney at Law
40 Woodland Drive
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United States of America

COALITION FOR ADHERENCE TO BERNE
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What is the Berne Convention?

The Berne Copyright Convention is the first (signed in 1886) and the most comprehensive international treaty governing the protection of copyrights around the world. As of 1986, seventy-six nations were members of Berne including all developed countries except for the United States, the Soviet Union and the People's Republic of China. The United States is currently a member of the Universal Copyright Convention which, while establishing for this country copyright relations with much of the rest of the world, no longer provides an adequate basis for ensuring full protection for, and therefore increased trade in, U.S. copyrighted films, books, records and tapes, computer software and other creative works embodying or manifesting the new technologies.

What is the Coalition for Adherence to Berne (CAB)?

The Coalition for Adherence to Berne is a group of trade associations and companies (a current and growing list, and the members of the CAB Executive Committee is attached) that have formed together to promote the legislation needed for the United States to adhere to the Berne Copyright Convention. It is a broad-based coalition representing the copyright-based industries such as the computer software, book publishing, motion picture, music, record, and toy industries, consumers and users of copyrighted material and other companies and associations concerned with improving the protection of, and international trade in, U.S. intellectual property generally.

What are the Benefits to the U.S. from Adherence to Berne?

The current U.S. campaign to combat worldwide piracy will be strengthened by U.S. adherence to the Berne Convention. Recent improvements in intellectual property protection in Korea, Taiwan and Singapore -- and prospectively in other countries -- are the result of an aggressive bilateral U.S. strategy. Incorporation of intellectual property in the GATT (the General Agreement on Tariffs and Trade) is a cornerstone of the U.S. multilateral trade strategy. U.S. absence from Berne is a significant impediment to full implementation of these strategies.

- U.S. adherence to Berne will enhance the credibility of U.S. trade negotiations. The U.S. cannot credibly urge other governments to improve their protection of intellectual property by adopting Berne-level standards of protection if the U.S. itself does not belong to the premier copyright convention. If we are successfully to complete the negotiation of a GATT agreement, it is important that the U.S. demonstrate that it is willing to obligate itself to the terms of the international agreement which has the highest level of protection.

- U.S. adherence to Berne will increase the chances for a successful conclusion of the GATT negotiations on intellectual property. It will be difficult for U.S. negotiators to adopt the highest levels of copyright protection if the U.S. is unwilling to join the convention in which those levels are found. Adherence to Berne will permit the U.S. to argue aggressively for acceptance of the fundamental principles of copyright protection embodied in Berne and to pursue a similar approach with other areas of intellectual property (i.e., patents, trademarks, etc.) where current international standards are clearly inadequate.

U.S. adherence will reduce the uncertainty of protection for U.S. copyrighted works in foreign markets and promote continued contribution of U.S. copyright industries to a positive trade balance. Copyright industries in the U.S., the world's largest exporter of copyrighted works, earn billions of dollars annually in foreign countries, thus helping to reduce our huge trade deficits. These worldwide interests are critically dependent on strong international copyright protection. Continued absence of the U.S. from the Berne Convention potentially jeopardizes this important income stream at a time when the trade deficit is a major problem and U.S. industry is facing increasing international piracy. New markets such as the People's Republic of China -- which is contemplating joining the Berne Convention -- are especially important.

- Adherence will give the U.S. direct copyright protection for the first time in the 24 countries, such as Egypt and Turkey, that belong to Berne but not to the Universal Copyright Convention (UCC) to which the U.S. belongs. Some of these countries are centers for piracy of U.S. works. Berne membership will eliminate the current requirement that U.S. copyright owners publish their works simultaneously in a Berne country to enjoy protection in these 24 countries.

- The "free ride" of simultaneous publication is, in fact, not free. It is available only to authors, composers and artists who can afford the intricate procedures for publishing in both the United States and in a Berne signatory country. Even those who can afford simultaneous publication find that the costs are onerous. One company along spends an additional $30 million annually to meet this requirement. Simultaneous publication is difficult to accomplish administratively and the failure to publish properly in unfamiliar markets can be very costly, because it can result in exposing U.S. works to piracy. Furthermore, documentary and evidentiary difficulties in establishing that a work has been simultaneously published in a Berne country substantially increase the cost and uncertainty of litigation, and provide a virtually automatic defense to pirates in a criminal or civil proceeding.

- The protection that U.S. works now receive as a result of Berne can come to an end at any time. Any Berne signatory can terminate the "free ride" that it may now permit for U.S. works through the "back door" of simultaneous publication in the United States and in a Berne member country. The levels of protection for a U.S. work may become problematic even in countries that also belong to the Universal Copyright Convention, since high levels of protection for U.S. works under local laws derive from adherence to Berne.

U.S. adherence to the Berne Convention would give it a voice and a veto in an organization that will increasingly be dealing with important questions that affect the competitiveness of U.S. copyright industries well into the twenty-first century. Contemplation of the establishment of another international forum for intellectual property issues in the GATT has created a new and welcome level of receptivity to change in WIPO (the World Intellectual Property Organization), which administers the Berne Convention, and in its member countries. The U.S. must become a Berne member to take full advantage of the opportunity to press for higher levels of protection worldwide and to resist any attempts to weaken Berne's fundamental standards.

If the GATT negotiations on intellectual property fail and the United States rejects adherence to Berne, many Berne countries might close the "back door" to protection. Should this happen, the United States could wind up in the worst of all possible worlds. U.S. international copyright relations would then be set back to a level not seen since the end of World War II, when the U.S. began to come out of its isolationist shell and recognize the substantial stake in foreign markets for its copyrighted works and the need to exercise leadership in the international copyright community.

Can the Risks Perceived in U.S. Adherence to Berne be Avoided?

Appropriate legislation can minimize the potential risks some now perceive in implementing Berne Standards in the U.S. All proposals for implementing legislation explicitly state that Berne is not self-executing. Therefore, anyone seeking the benefit of U.S. obligations under Berne can make a claim only under the provisions of U.S. domestic law.

Few changes are required in our copyright laws to permit U.S. adherence to the Berne Convention. The jukebox provisions are being worked out. The concerns of users have been addressed. Moral rights are adequately addressed in current law. Uncertainty would thus be minimized and current business practices would not be upset. Adherence will not require any changes in the provision of our copyright law that benefit schools, libraries and other public sector copyright users.

U.S. adherence to Berne will in no way effect a change in the present state of U.S. law on moral rights. Rights equivalent to the minimum required by Berne already exist in the U.S. through a combination of statutory and common law doctrines. While the "moral right" had its genesis in the civil law tradition, the term itself does not even appear in the Convention and the practices of Berne countries vary widely. This Berne obligation is entirely consistent with the U.S. common law and statutory approach to copyright protection.

Is the Congress Now Considering Implementing Legislation?

Yes, the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee has just completed hearings on H.R. 1623 introduced by the chairman, Mr. Kastenmeier (D-WI) on March 16, 1987 and on H.R. 2962 introduced by Mr. Moorhead (R-CA) on July 15, 1987 as the Administration's bill. Senate hearings commence on February 18 before the Subcommittee on Patents, Copyrights and Trademarks chaired by Senator DeConcini (D-AZ) on S. 1301 introduced by Senator Leahy (D-VT) on May 29, 1987 and on S. 1971 introduced by Senators Hatch and Thurmond on December 18, 1987 as the Administration's bill. Adherence to the Berne Convention has received the strong support of the Administration.

What Principles Should Be Embodied in Berne Adherence Legislation?

Implementing legislation and, where appropriate, the legislative history should be guided by the following principles:

Congress should determine those changes in current U.S. law minimally necessary to adhere to Berne and should confirm in implementing legislation that only those, and no other, changes are required.

The Berne Convention is not self-executing. Except for those minimal changes necessary to ensure compatibility, adherence should not in any way affect the present state of U.S. law. To accomplish these objectives implementing legislation should provide that:

- No provision of Berne is directly enforceable in any U.S. court. Private rights exist only to the extent specifically provided for in U.S. domestic law without regard to any laws or practices of other Berne signatory countries.

- Current U.S. law is compatible with Berne in the "moral right" area. The legislation should make clear that in this area rights under current U.S. law are neither reduced or expanded as a result of U.S. adherence to Berne.

Members of the Executive Committee

James E. Ingram, Director, Government Relations
IBM Corporation

William L. Keefauver, Corporate Vice President - Law
AT&T

Manfred Kuehn, Senior Vice President and General Counsel
BMG Music (Formerly RCA-Ariola International)

Thomas Lemberg, Vice President and General Counsel
Lotus Software

Larry Levinson, Senior Vice President
Gulf & Western (for Paramount Pictures and Simon & Schuster)

Peter Nolan, Vice President and Counsel
Walt Disney Studios

Don Robbins, Vice President and General Counsel
Hasbro Toy Company

Richard Rudick, General Counsel
John Wiley & Sons, Inc.

CAB SIGNERS

ADAPSO
American Electronics Association
American Film Marketing Association
Association of American Exporters and Importers
AT&T
BMG Music (Formerly RCA-Ariola, Intl.)
California Council for International Trade
Computer and Business Equipment Manufacturers Association
Consumers for a Sound Economy
Digital Equipment Corporation
Elsevier, Science Publishing Co., Inc.
Gulf & Western (Simon & Schuster
Paramount Pictures)
Hewlett-Packard Company
Hasbro Toy Company
Hudson Hill Press
IBM Corporation
Information Industries Association
Intellectual Property Committee
Intellectual Property Owners
John Wiley & Sons, Inc.
Lotus Software
Motion Picture Association of America
National Association of Manufacturers
Texas Instruments Incorporated
Training Media Distributors Association
Walt Disney Studios

Senator DeConcini. Thank you.

I will at this moment yield to my ranking member of the committee, Senator Hatch from Utah.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator Hatch. Well, thank you, Senator DeConcini. I appreciate being here and I appreciate your diligence in holding this particular hearing, and welcome all witnesses to the table. It is certainly nice to see you again, Ken, and nice to have you here.

Mr. Chairman, at the end of last year on behalf of the administration I introduced S. 1971, the Berne Convention Implementation Act of 1987, which would place the United States in the position of being able to join that distinguished and venerable convention. It is no secret that the primary obstacle that stands between this subcommittee and enactment of this kind of legislation is the controversy of the application of a body of law called "moral rights."

In an effort to promote discussion and cooperation toward the goal of ratifying Berne, I placed in the Congressional Record just yesterday a proposal that may help resolve some doubts that current copyright relationships will not be altered by ratification of the convention. Now I do not pretend that this is a finished product, but I hope it will promote the discussion that may produce a bill, especially a bill that can be adopted without reservations in the Senate.

Now as I have said before, I look forward to working with you, Mr. Chairman, Senator Leahy, and all members of the subcommittee in the Senate to enhance international copyright protections without disrupting current copyright relationships. I think we all realize this is an important issue. There are a lot of people involved. There are very hotly contested aspects of this issue, and we want to do what is right, worldwide but certainly for our country.

There is no question something needs to be done, in my mind, and I think that we have grabbed the bull by the horns and we are going to see that something is done. I hope that this hearing will give us the opinions and the feelings of everybody concerned so that we can move ahead with dispatch and do what really needs to be done.

I want to thank you again, Mr. Chairman, for your leadership in this area. We appreciate it, and we appreciate all the witnesses who are willing to appear.

Senator DeConcini. I thank my friend.

Mr. Clemente.

STATEMENT OF C.L. CLEMENTE, VICE PRESIDENT AND GENERAL COUNSEL, PFIZER INC.

Mr. Clemente. Thank you, Mr. Chairman, for being allowed to testify on behalf of adherence to the Berne Convention.

I should begin my testimony by admitting to you that I am not a copyright expert. Furthermore, as you may know, Pfizer is primarily a health care company and principally in the business of pharmaceuticals and hospital products. The prime area of intellectual property of concern to Pfizer and the health care industry generally is not that of copyright; in fact, it is the area of patents.

So you might ask the question: Why then—since I am not a copyright expert and since in the day-to-day operations of my company, and in fact my industry, copyright is not important—why am I here? The short answer is that we at Pfizer firmly believe that adherence to the Berne Convention would go a long way toward our goal of improving intellectual property rights worldwide on an overall basis, and I would like to give you just a bit of the reasoning as to how we came to that conclusion.

As I mentioned to you, Pfizer is a health care company and it is a true multinational company. We have plants in 65 countries, operations in 140. Half of our 40,000 employees are overseas. It is also very heavily involved in research and development. This year we will spend some $300 million on research in the health care field, and the figure for the health care or just the pharmaceutical industry is in the billions of dollars. This money is spent to invent new pharmaceuticals and other health care products and to bring them to market.

It often takes $125 million and 10 to 12 years to bring a product to market, but like the computer software industry, and in fact the movie industry, and to a certain extent the book industry, virtually all the effort and energy goes into the invention and development of the product. Once the product is discovered, the book written or the software created, the cost of reproduction is minimal, so that we suffer from piracy overseas just as the copyright industry does, in that the cost of production is low. If there are no laws to protect our property overseas, then pirates can drive us from the marketplace, so to that extent we have a very common interest with the copyright industries that are appearing before you today.

But more than that, we have found, in seeking an active role in the attempt to enforce and increase protection for intellectual property overseas, that we are often met with objections from our trading partners, both the private and the public sectors, that the United States is not a major player in the international arena of intellectual property; that although it calls for high standards in the areas of patents, trademarks and copyright, it itself is not a member of the premier convention for copyrights.

I have had this personal experience myself many times over. I am chairman of the U.S. Council for International Business, Committee on Intellectual Property Rights. That committee is involved with the International Chamber of Commerce and with WIPO and other international bodies that have a major concern for intellectual property.

I find time and again, in discussing greater protection for patents, that other areas of intellectual property are brought up. Previously it was the manufacturing clause. Currently it is the Berne Convention. In many negotiations with developing countries, when we ask them to apply higher standards than they currently have, again they refer to the fact that the United States often doesn't join international conventions, and the Berne Convention is a leading example of that.

So that overall we have concluded—and this includes not only myself but the top management of Pfizer, which is very much involved in the fight to get greater protection for intellectual property, both within the GATT and through other multilateral and bilateral agreements—that intellectual property is very much interrelated in the minds of others with whom we deal; that when we speak patents, copyrights and trademarks are often brought up to us.

So that we have found, first, that it is not possible to draw clean distinctions in the minds of those with whom we deal, between the various arenas of intellectual property. Second, we have also found that the only time we have made real progress is when the various industries interested in the different fields of intellectual property stand together and support each other in the protection of their rights.

We had this experience, as Mr. Dam pointed out, in our negotiations with the Government of Korea. That government attempted, at some point during the negotiations, to split off the pharmaceutical industry and the book publishing industry from the negotiations, and it was only when industry stood together as a whole that we were able to assist the U.S. Government in achieving an overall, effective agreement.

So I hope this has given you some of the background as to why, although the pharmaceutical industry in general and even the broad-based chemical industry is not affected on a day-to-day basis by the Berne Convention, we believe very strongly that adherence to Berne will help our efforts for a comprehensive improvement of intellectual property rights on the bilateral front and on the multilateral front (including the GATT) and will also help U.S. copyright holders to obtain greater protection. Finally, not to be forgotten is the greater role we will receive in the WIPO, which administers the Berne Convention.

Thank you.

[The prepared statement of Mr. Clemente follows:]

STATEMENT OF

C. L. CLEMENTE

Vice President - General Counsel,

Pfizer Inc.

SUMMARY OF THE STATEMENT

Pfizer, a research-based, multinational health care company, is committed to improving protection of all forms of intellectual property. Pfizer's principal interest in intellectual property is in the area of patent protection. The substantial and costly investment in pharmaceutical technology makes protection of innovation so important. It costs up to $125 million to research, develop and gain approval of a drug and takes up to 10-12 years to bring it to market. Yet, a reasonably competent chemist can duplicate the drug at trivial cost and displace the developer from the market, unless prevented by effective laws.

While protection of copyrights is of less significance to Pfizer, we strongly support U.S. adherence to Berne for the following reasons:

1) The consequences of Berne adherence are fundamental to the overall objective of improving worldwide protection of intellectual property.

2) U.S. adherence to Berne will enhance U.S. efforts to reach a successful conclusion of the critical and far-reaching GATT negotiations on intellectual property.

3) Berne adherence would provide U.S. copyright holders with many critical advantages to aid in improving their competitiveness.

4) U.S. adherence to Berne will give the U.S. a voice and veto in the World Intellectual Property Organization, Berne's administering body, at a time when WIPO will increasingly be dealing with important copyright and other intellectual property questions.

In summary, adhering to Berne will be a significant step forward in pursuing a comprehensive approach to more effective protection of intellectual property throughout the world. It is a step that we must take now.

* * *

Good Morning. My name is Lou Clemente and I am Vice President - General Counsel of Pfizer Inc. As many of you know, Pfizer is a company with about $5 billion in sales whose principal business is health care. You may also know that for health care companies like Pfizer patents are by far the most important area of intellectual property. Trademark protection is next in importance. Copyright is of far less significance in our day to day operations although we do seek protection for various scientific publications and articles as well as the official descriptive brochures and packages for our products. Why then am I here testifying in favor of adherence to Berne and the prompt passage of appropriate enabling legislation?

To answer this question, please allow me to tell you a bit more about Pfizer's activities and those of the health care (principally pharmaceutical) industry and our efforts to strengthen intellectual property rights.

Pfizer is truly a multinational company. Pfizer operates in more than 140 countries and has a manufacturing presence in 65. International sales in 1987 were significantly higher than the year before (46% in 1987 vs. just over 40% in 1986).

Pfizer is also a research-based company. In 1987, Pfizer's R&D expenditures were twice the amount spent in 1982 and almost five times that spent in 1975. In 1988, the Company plans to increase its investment in R&D by 16%. The substantial investment in technology by the research-based health care industry makes protection of innovation so important. It costs up to $125 million to research, develop and gain approval of a drug and takes 10 to 12 years to bring it to market. Yet a reasonably competent chemist can duplicate the drug at trivial cost and displace the developer from the market, unless prevented by effective laws.

Clearly, effective intellectual property protection is necessary to maintain the incentive to invest in costly research and development. Furthermore, to continue the development of vitally-needed new drugs, rights to our pharmaceutical technology need to be protected not only in the developed world but all over the world. Our research serves everybody; for it to continue, the fruits of that research must be respected. Many countries want to enjoy the benefits of technology, but do not want to respect the rights to such technology. The figures just published by the International Trade Commission make this fact clear. U.S. losses from theft of intellectual property abroad are enormous. Those losses diminish the substantial contribution of intellectual property exports to our balance of trade.

Because Pfizer became convinced that worldwide protection of intellectual property rights is absolutely vital to our interests and to our future, we have devoted a great deal of time and energy to this issue over the past few years. Pfizer's Chairman and CEO, Edmund T. Pratt, Jr. served as Chairman of the Advisory Committee for Trade Negotiations ("ACTN") an organization that strongly supported the Reagan Administration's successful effort to have intellectual property included in the current round of GATT negotiations. Mr. Pratt continues to serve as a member of ACTN and as Chairman of its Task Force on Intellectual Property. Pfizer's President, Gerald D. Laubach, Ph.D., served on the President's Commission on Industrial Competitiveness which issued the well-known report on improving intellectual property rights.

My own activities include the Chairmanship of the Task Force of the U.S. Council for International Business (U.S.C.I.B.) whose report calling for inclusion of intellectual property protection within the GATT is a widely used reference in the field today. I am presently Chairman of the Intellectual Property Committee of the U.S.C.I.B. and a member of the Management Committee of the Intellectual Property Committee ("IPC"). The IPC is a coalition of about a dozen United States companies that represents a broad spectrum of intellectual property interests including companies which rely on adequate and effective copyright protection. It is also on record as supporting U.S. adherence to Berne.

In working to strengthen intellectual property rights worldwide, Pfizer has had a great deal of interaction with both the private and public sectors of our trading partners in both the developed and developing worlds. From this experience, two principles have clearly emerged. First, the various forms of intellectual property rights (i.e., patents, trademarks, copyrights, etc.) are widely seen as interrelated and those interested in one form must be strongly supportive of all forms of intellectual property if there is to be any progress. Secondly, the United States must continue to enhance its credibility as a serious player in the international arena for intellectual property in order to achieve our goals of strengthening rights on a worldwide basis.

This brings me back to why I am testifying in favor of U.S. adherence to Berne. As you can imagine, it is not because I am a copyright expert or because U.S. adherence to Berne will have a major impact on Pfizer's business.

Rather, I am here today to express support for U.S. adherence to Berne because Pfizer is firmly convinced the consequences of such action are fundamental to the overall objective of improving worldwide protection of intellectual property. By providing Berne standards of copyright protection the U.S. is demonstrating its commitment to improve worldwide levels of protection for copyrighted works and to be a participant in the administration of one of the most important international agreements in the area of intellectual property. There are additional reasons supporting Pfizer's position.

Although I am not an expert, I am informed Berne adherence would provide a higher level of protection for copyrighted works throughout the world. It would make unnecessary the expensive and inconvenient requirement of simultaneous publication to achieve Berne protection for U.S. copyrighted works, and would give us copyright relations with 24 additional countries that are members of Berne but not the Universal Copyright Convention. Berne adherence would also give the U.S. a more effective voice in developing international copyright policy, which is particularly important for works of new technology.

U.S. adherence to Berne will also give the United States a voice and a veto in the World Intellectual Property Organization, which administers the Berne Convention, at a time when this institution will increasingly be dealing with important questions that effect the competitiveness of U.S. copyright industries well into the twenty-first century. Berne membership will permit the United States to press for higher levels of protection worldwide and - most importantly - to resist any attempts to weaken Berne's fundamental standards.

Pfizer supports Berne, however, not just to achieve better protection for U.S. copyrighted works. Most importantly we are convinced that Berne adherence is also an important step toward protecting all forms of U.S. intellectual property more effectively under a comprehensive international agreement.

The U.S. is currently negotiating for an intellectual property code under the General Agreement on Tariffs and Trade (the "GATT"). The GATT would provide a much-needed enforcement mechanism, but the standards to be enforced need to be defined and agreed upon. For copyright, the only appropriate standards are those in Berne, because of its high levels of protection. However, U.S. negotiators meet with charges of hypocrisy when we ask our trading partners to rely on and adopt Berne standards and we ourselves are not members of Berne.

You heard about those charges of hypocrisy, Mr. Chairman, when the Administration witnesses testified on February 18. I can confirm, from my own dealings with my private and public sector colleagues in other countries, that we must enhance our credibility in the GATT negotiations. Adherence to Berne would significantly aid us in doing that. On the other hand, our failure to adhere could result in long, drawn-out debates about the appropriate scope and level of protection to be provided, and could jeopardize the intellectual property initiative in the GATT.

Some have suggested that we don't need Berne if we have the GATT. That's not so. We need both: one is not a substitute for the other. Berne adherence is an important step toward achieving a GATT intellectual property code, but even if we are successful, it is unlikely that all 76 Berne members would immediately become signatories to the GATT code.

Effective protection for all forms of intellectual property is of primary importance for Pfizer and, indeed, for American industry. Intellectual property contributes significantly to our economy, to our international competitiveness and to reducing our trade deficit. It could contribute substantially more if piracy were halted. Adhering to Berne will not immediately wipe out worldwide piracy, but it will be a significant step in a comprehensive approach to more effective protection of intellectual property through the world. It is a step that we must take now.

For these reasons, Mr. Chairman, we strongly support the prompt enactment of appropriate implementing legislation to permit the U.S. to adhere to Berne.

I would be pleased to answer any questions you may have.

Senator DeConcini. Thank you, Mr. Clemente.

I will yield to the Senator from Alabama if he has any opening statement he cares to make.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator Heflin. Well, Mr. Chairman, I would like to commend you for holding these hearings. Over the past several years there has been renewed interest in protecting intellectual property rights both at home and abroad.

We are here today to discuss the adherence to the Berne Convention, which has heretofore been impossible because of the many differences between our copyright law and that imposed by Berne, and an unwillingness on our part to eliminate those differences to conform to the requirements of Berne.

We appear to be at a point where many of the affected parties are willing to eliminate those differences. They have joined forces and reached a consensus on many of the issues that traditionally have been a stumbling block in adhering to Berne. There remains, however, one major area of disagreement, moral rights. Both sides of the issue present persuasive arguments. In weighing these competing arguments, I think it is important to keep in mind the dual purpose of copyright legislation: to promote public access to creative works and to protect the rights of the creators of these works. I believe these goals are of equal importance.

Any change in the current system should be approached with great caution. Hence, in listening to the testimony today I will be looking for answers to the following questions:

Does membership in the Uniform Copyright Convention adequately protect U.S. copyright interests in foreign nations?

If not, would adherence to the Berne Convention provide the necessary protection?

If so, what are the costs of joining Berne, and do they outweigh the benefits?

Finally, is the inclusion of a moral rights provision one of the necessary costs?

I look forward to the testimony of our distinguished and accomplished witnesses today. Thank you, Mr. Chairman.

Senator DeConcini. Thank you, Senator Heflin.

Mr. Brown.

STATEMENT OF DAVID BROWN ON BEHALF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Mr. Brown. Mr. Chairman, distinguished Senators, my name is David Brown. I am very pleased and grateful to be here as part of this Coalition for Adherence to Berne.

I am a motion picture producer, one of those who, according to the morning news, is a corporate defacer and might paint a moustache on the Mona Lisa. [Laughter.]

Among my credits——

Senator DeConcini. I'm sorry, Mr. Brown. A corporate what?

Mr. **Brown**. I am referring, with all respect, Senator, to a remark on the morning news programs describing some of us in my particular profession as corporate defacers.

My motion picture credits, along with those of my partner, Richard D. Zanuck, include producing "The Sting," "Jaws," "Cocoon," "The Verdict," "MacArthur," Steven Spielberg's "Sugarland Express," "The Eiger Sanction," and "Target," and many other films less well known and less successful. My partner and I are producers and formerly heads of major motion picture companies, and have been involved in every aspect of filmmaking. We are creative partners in the filmmaking process and not merely financiers. Nobody who knows us would suggest that we are enemies of the creative process or the creative community.

I appear today on behalf of my own company, as well as the Motion Picture Association of America and the Alliance of Motion Picture and Television Producers. Here are the points that we feel are crucial, and wish to emphasize, with respect to the need for adherence to the Berne Convention.

First and foremost, adherence will be an important means of combating the ever-increasing piracy of motion pictures overseas. Piracy, the unauthorized and uncompensated duplication of American films and television shows, has so escalated in recent years that it has become an ever-present danger not only to the artistic community and the private sector but also to the national interest in terms of our balance of payments.

Piracy is so rampant that in some countries it is difficult to find a legitimate copy of a prerecorded video cassette of an American film. I have here three illegal copies of my own films—"Cocoon," "Jaws," and "The Sting." The arrogance of these pirates is that they even have warnings here prohibiting anyone from copying this. [Laughter.]

We need every weapon we can muster in the struggle against film and video piracy around the world. Berne would be an important weapon in our arsenal, and there is really no time to lose.

The second point is that our adherence is in the best interests of both the American public and the U.S. motion picture and TV industry. In an era of enormous trade deficits, I need hardly mention that the U.S. film industry and television industry stands out as an invaluable trade asset. Our industry contributes $1,200,000,000 annually in surplus balance of trade, so there is in our minds a clear and substantial public interest in preserving that trade asset.

By the way, American films are not gold mines by any means. The Motion Picture Association has just released statistics that the cost of producing a feature film in this country is now over $20 million, up 113 percent since 1980. You can see the creative community has not suffered. We do not welcome those increases. We also spend an average of about $9 million for advertising and distributing each film. We need the foreign market to sustain a prosperous American film industry. Historically, foreign revenues have accounted for from one-third to one-half of world revenues and one crucially needed to support these enormous production costs.

Third, congressional action to secure U.S. adherence, it seems to us, would be entirely consistent with recent trade initiatives by the

Federal Government to help protect U.S. intellectual property abroad.

And, fourth, U.S. adherence to Berne does not in our view require adoption of a Federal moral rights law. It has been asserted by some that U.S. adherence to Berne is dependent upon the adoption by Congress of Federal moral rights legislation. That assertion, we submit respectfully, is simply not true.

The Berne Convention does not require that each member nation to have a specific moral rights law. The convention leaves it up to each signatory nation to decide how to comply with the convention's general, nonspecific terms. Some countries have specific moral rights laws; others do not.

That is not just our opinion; it is the opinion of an overwhelming number of those who have looked at this question, and I won't burden the subcommittee with all the names because you know them all. They are all experts, and the record will show who they are.

The creative motion picture community is not helpless in any way. As we speak, the writers of Hollywood are in the process of either striking or not striking on a matter which would involve creative rights. They have high-priced lawyers, experienced labor negotiators. They are not supine.

I would like to point out something else, with all respect. Motion pictures may be art, and many of them are works of art that have enduring value, but a motion picture is not as a rule the work of one or two persons. It is not the same as a Monet. It is not the same as a symphony by Strauss.

It represents the fusion of many talents: the writer of the story on which the movie is based, the performance of the actors—Imagine "Mr. Smith Comes to Washington" without Jimmy Stewart. Isn't he part of the total package? Also germane to the artistic whole of a film and the music, the special effects, the editors, and the vision of the producer, who may well have had the basic idea of the film in the first place. My point is that producers and some of these producing companies are part of the creative process and have created a good environment for creative work.

I believe that we should move with all due speed on implementing adherence to Berne, and put all other issues to one side to be addressed separately. I and my colleagues have very specific ideas on those issues when the appropriate forum and time comes.

Thank you very much.

[The prepared statement of Mr. Brown follows:]

STATEMENT OF DAVID BROWN

ON BEHALF OF

THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.
THE ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS
AND
THE ZANUCK/BROWN CO.

March 3, 1988

Summary of Testimony of David Brown

The Motion Picture Association of America, the Alliance of Motion Picture and Television Producers, and the Zanuck/Brown Co. support U.S adherence to the Berne Copyright Convention. We do so because adherence will provide much-needed help in our efforts to combat the foreign piracy of U.S. films and TV shows that robs our industry of about 1/2 billion dollars a year in revenues.

We believe U.S. adherence to Berne will help our anti-piracy efforts because:

-- U.S. films and TV shows will have direct copyright protection in those countries that are members of Berne, but that do not have copyright relations with the U.S.

-- it will eliminate the cumbersome, and not always successful "backdoor" procedure by which U.S. copyright owners currently seek Berne protection by publishing their works simultaneously in the U.S. and in a Berne member country.

-- it will strengthen U.S. arguments for stronger copyright laws in foreign countries.

-- it will enhance the U.S. position in pressing for Berne-type standards in the current round of GATT negotiations.

Our support for U.S. adherence to Berne is not unconditional. Above all, the Berne implementing legislation must not contain a federal moral rights provision. The implementing legislation also must make clear that:

-- Berne is neither self-executing nor directly enforceable in the U.S.;

-- current U.S. law satisfies Berne requirements in the "moral rights" area, and that adherence to Berne neither contracts nor expands rights granted under our domestic laws in this area; and

-- existing law and the implementing legislation meet our obligations under Berne and no further legislation is needed.

* * *

Mr. Chairman, my name is David Brown. I am a partner with Richard Zanuck in the Zanuck/Brown Co.

I appear here today on behalf of my own company, as well as the members of the Motion Picture Association of America (MPAA)[1] and the Alliance of Motion Picture and Television Producers (AMPTP)[2]. I welcome the opportunity to share with the Subcommittee our views on whether the United States should adhere to the Berne Copyright Convention and, if so, how the implementing legislation should address the so-called "moral rights" issue.

In sum, we believe that U.S. adherence to Berne will add an important weapon to our arsenal as we combat the ever-increasing piracy of our products overseas. Today piracy in foreign markets deprives the American film and TV industry of about half a billion dollars annually in revenues. In our view, Berne will help us in our efforts to stem this tide and, by doing so, will protect our industry's ability to contribute $1.2 billion annually in surplus balance of trade.

I must point out that our support for U.S. adherence is not unconditional. As I discuss later in greater detail, it is dependent upon the implementing legislation addressing the "moral rights" issue in an appropriate fashion.

In particular, the implementing legislation must not contain a federal "moral rights" provision. Instead, it must reflect the overwhelming weight of scholarly opinion that existing laws in this country satisfy the "moral rights" requirements of Berne and that there is no need whatsoever for the U.S. to enact a federal "moral rights" law in order to qualify for Berne.

Mr. Chairman, a personal note.

I am an experienced producer of motion pictures. I've spent much of my professional life in the motion picture business, in the trenches, first at Twentieth Century Fox and more recently at my own production company.

Among the films my partner, Richard Zanuck, and I have produced are: The Sting, Jaws, Cocoon, The Verdict, The Sugarland Express, The Eiger Sanction, MacArthur, and Target.

In addition, Mr. Zanuck and I served as President and Executive Vice President respectively of Twentieth Century Fox Film Corporation and in similar executive posts at Warner Bros. supervising all aspects of production on a worldwide basis for these companies. I am also an author of books and therefore a copyright owner.

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[1] The members of MPAA are: The Walt Disney Company; The De Laurentiis Entertainment Group, Inc.; MGM/UA Communications Co.; Orion Pictures Corporation; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal City Studios Inc.; Warner Bros. Inc.; and Columbia Pictures Entertainment.

[2] The AMPTP represents a variety of producers of TV programs and motion pictures, such as: Aaron Spelling Productions; The Burbank Studios; Columbia Pictures Entertainment; Embassy Television, Inc.; Four Star International; Inc. Hanna-Barbera Productions; Lorimar-Telepictures; MGM/UA Communications Co.; MTM Enterprises; Orion Television; Inc. Paramount Pictures Corp.; Ray Stark Productions; Stephen J. Cannell Productions; Sunrise Productions, Inc; Twentieth Century Fox Film Corp.; Universal City Studios, Inc.; Viacom Productions, Inc.; Walt Disney Pictures Inc.; Warner Bros. Inc.; and Witt/Thomas/Harris Productions.

I know the ins and outs of the U.S. film industry, how it operates both here and abroad. I think that my perspective will help the Subcommittee to understand why those I represent today believe that it is in the best interest of the American film and TV industry for the U.S. to adhere to Berne.

Piracy of U.S. Films and TV Shows Abroad

To appreciate our position on Berne adherence, it is essential to have an understanding both of the importance of foreign markets to the American film industry and the severity of the threat posed to these markets by unscrupulous pirates.

American-made films and TV shows are enormously popular overseas. People throughout the world want to see and enjoy American films and TV shows more than any other country's similar creative material. That's why U.S. films are shown in more than 100 countries, American TV shows are broadcast in over 90 foreign markets, and American companies provide the vast majority of prerecorded videocassettes seen in millions of homes worldwide.

Today, foreign markets are a major contributor to the overall revenues garnered by our industry. Traditionally, one-third, and sometimes more, of the overall revenues of MPAA member companies are derived from outside the United States. The continued flow of these foreign revenue streams is essential to the financial well-being of our industry.

The immense popularity of our films and TV shows abroad has made them an invaluable trade asset. Ours is one of the few industries that returns a favorable balance of trade to this country. We contribute $1.2 billion a year in surplus balance of trade.

But there is a growing specter hanging over our industry that threatens this invaluable trade resource: piracy.

The losses attributable to piracy are substantial. MPAA estimates that the loss in potential revenues from foreign film, videocassette and signal piracy[3/] is about **a half billion dollars annually** -- approximately one-tenth of the yearly box office gross from all U.S. theaters. These lost revenues represent a lost positive contribution to America's balance of trade.

Not too long ago, piracy in our industry was limited to the unlicensed exhibition of 16 and 35mm prints. That is no longer the case. New modes of distributing our films mean new ways of stealing our products and revenues. In just the last several years the emergence on a global basis of the VCR and satellite-delivered programs, while creating wonderful new marketing opportunities, have also spawned new forms of piracy that were previously unknown.

Today, our motion pictures are illegally duplicated on a wholesale basis and our rightful revenues are stolen by pirates operating outside of this country. All too often these thieves are aided and abetted by foreign governments that refuse to provide U.S. works with adequate intellectual property protection or to enforce their copyright laws effectively.

There are countries where it is extremely difficult to find a legitimate copy of a prerecorded copyrighted cassette of an

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[3/] In this context, signal piracy abroad includes the unauthorized interception by commercial establishments (such as bars and hotels, as well as large and small cable TV systems) of copyrighted material transmitted via satellite.

American film. Thailand, Indonesia, Egypt, Cyprus, South Korea and others fall into that category.

Moreover, in a number of foreign markets U.S. films are often available within days of their U.S. theatrical release. Because U.S. film companies release their product sequentially[4] the premature availability of films in pirated cassette form affects all "downstream" markets negatively and thus is extremely damaging.

The plight of E.T., one of the most popular films of all time, is instructive in this regard.

E.T. was illegally duplicated onto videocassette even before it was theatrically released in this country. Although E.T. has never been officially released on cassette, and will not be so released until later this year, it is consistently rated as the most popular videocassette in viewer polls taken in countries around the world!

And just last year the latest James Bond film, The Living Daylights, turned up in videocassette form in the Middle East before its world theatrical premiere!

Mr. Chairman, let me try to personalize the piracy problem.

At the outset of my remarks I named a number of films that I produced or co-produced. Most, if not all, of those films have gone through what has become known as the "usual piracy circuit in the Middle East." This means that pirated cassettes were duplicated and circulated in the Middle East within weeks of their theatrical release in the U.S., or in some cases, prior to theatrical release in the U.S.

We in the film industry know that the piracy menace will only get worse as technological developments continue to make illegal copying easier and more pervasive. We need all the tools we can muster to combat piracy both here and abroad. That is why we strongly support Berne adherence by this country.

Fortunately, there has been a markedly increased recognition in Washington that there is no real prospect of controlling overseas piracy of intellectual property without the active participation of the federal government. Over the past several years Congress has:

- adopted amendments to the Caribbean Basin Initiative designed to use U.S. trade benefits as leverage to stop interception and retransmission of copyrighted satellite-delivered programs in that region, and

- enacted the 1984 Omnibus Trade Act that built intellectual property protections into both the Generalized System of Preferences and Section 301 of the 1974 Trade Act.

Moreover, both the House and Senate versions of the major trade bill, H.R. 3, pending before a House-Senate Conference contain intellectual property protections that build on those found in the earlier laws.[5]

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[4] Generally, a U.S. movie studio first releases its films theatrically in this country, then to theaters in foreign markets, the domestic home video market, pay cable, network TV, and finally into broadcast syndication. Moreover, international home video distribution may trail domestic theatrical and home video release of a film by six months or more.

Congressional action to secure U.S. adherence to Berne would be entirely consistent with these other efforts by the federal government to help protect our intellectual property abroad.

Advantages of U.S. Adherence to Berne

1. Adherence to Berne Will, For the First Time, Provide Direct Protection for U.S. Works in A Number of Foreign Nations. "Back Door" Berne Proof Will No Longer Be Necessary.

a. Protection in Berne, Non-UCC Countries.

There are two major international copyright treaties, the Berne Copyright Convention and the Universal Copyright Convention (UCC). The United States is a signatory to the UCC, but not to Berne. The USSR is the only other major industrialized country that does not adhere to Berne.

Today there more than 20 nations that are members of Berne, but not the UCC.[6] These countries have no direct copyright treaty relations with the United States. The only way for U.S. copyrighted works to be protected in these countries is through the "back door" to Berne. This refers to the time-consuming, expensive, and not always successful practice of qualifying a U.S. work for copyright protection by arranging for its first publication simultaneously in the U.S. and in a Berne nation.

Adherence to Berne will mean that U.S. copyright owners will immediately receive direct, quicker and more certain copyright protection in these countries and they will be better protected against piracy. No longer will they have to go through the back door. Since back door Berne is fraught with problems, the benefits to U.S. copyright owners of such "direct" eligibility for copyright protections are substantial.

First, back door Berne is expensive; while larger organizations may be able to bear this expense, for many other smaller entities and individuals it is simply not economically feasible.

Second, proving simultaneous publication is time-consuming. Copyright owners must compile the evidence necessary to convince a foreign court that the particular motion pictures were "published simultaneously," and then travel to the foreign tribunal to make its case. That is often a tough task. Distribution records for motion pictures are often inadvertently lost or destroyed. The necessary records simply may not exist for older U.S. movies.

Third, even where the records are available, success is not assured. A recent example in Thailand -- a leading pirate haven -- bears this out.

A senior executive of a U.S. motion picture company made two trips to Thailand to show a local court that his company's films were appropriately simultaneously published in a Berne country in order to secure copyright protection. These efforts were needed to forestall a local pirate from freely copying and selling the studio's U.S.-made films.

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[5] Both the House and Senate bills would amend Section 301 of the 1974 Trade Act to expedite trade complaints dealing with the piracy of intellectual property in foreign countries. The Senate bill extends these same expedited procedures to complaints based on foreign trade barriers that hamper market access for intellectual property.

[6] These countries include Egypt, Turkey, Thailand, Uruguay, Cyprus, Zaire and Zimbabwe.

Regrettably, the court ruled that the films involved, Earthquake and one of the films I produced, The Sting, were not "published" for purposes of Berne. The pirate was free to continue his dirty work. Had the U.S. been a Berne signatory, there would have been no need to make such a presentation in court.

Moreover, there is the potential threat that the back door to Berne might well be slammed shut if the U.S. once again fails to adhere to Berne. Article 6(1) of the Berne Convention specifically permits Berne members to retaliate against the works of non-members. Resenting our "free ride" via the "backdoor," some Berne members might do just that, giving local pirates a free hand to pilfer our creative efforts.

b. Pre-1955 Classics.

There are a great many classic films copyrighted in the U.S. before 1955 (the year the UCC became effective in most commercially important countries) that have never been protected in some Berne countries. This is because these films were not simultaneously published in the relevant foreign country within the required time period and the UCC protections are not retroactive. As a result, a number of popular and valuable films have never been protected in commercially important countries, such as the United Kingdom. Under Article 18 of Berne, these films would have their copyright protection "resurrected" following U.S. adherence to Berne.[7]

2. Adherence to Berne Will Put the U.S. In A Better Posture to Argue for Higher Protection of U.S. Copyrighted Works Abroad.

Of the two major international copyright treaties, Berne and the UCC, Berne provides a higher level of protection for copyrighted works. While both treaties contain set levels of protection below which a signatory may not go, the UCC's minimum levels of protection are significantly below those of Berne.

Dissatisfaction with the level of protection in the UCC is a motivating factor in the push for U.S. adherence to Berne. This is in large part because our absence from Berne makes it extremely difficult for our government to push for Berne-level protections when it negotiates with foreign governments. In effect, foreign nations are using our absence from Berne as a convenient excuse to refuse to bolster their own laws or to join Berne themselves.

Clayton Yeutter, the United States Trade Representative, made this very point during hearings on Berne implementing legislation before the House Copyright Subcomittee:

> Too often we have found that our non-adherence to Berne is the basis for foreign resistance to making changes in their inadequate laws. .... Achieving meaningful results in negotiations requires leverage. In this area, the leverage comes from setting the right example for the rest of the world, and that requires adherence to the Berne Convention.

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[7] Under Article 18, a country may choose to allow pre-existing users of the newly protected motion pictures or TV programs to continue to exploit the resurrected works without fear of recourse from the newly recognized copyright owner. Such retroactivity need not be reciprocal, however, and thus the Berne implementing legislation need not provide for such retroactivity.

A couple of real-life examples will illustrate the problem.

During recent negotiations between the United States and the Republic of Korea, representatives from the U.S. private sector pressed for a new Korean copyright law that contained Berne-level protections. U.S. negotiators reluctantly responded that they could not make the case for more than UCC-levels of protection. The result was a Korean law that does not provide a retransmission right (although the Koreans agreed to "study" it).

In a related vein, American efforts to convince the Koreans to join Berne rather than the UCC were met with comments about our own failure to adhere to Berne. (The Republic of Korea joined the UCC last year.)

And, in Thailand, a Berne signatory, the government and the Parliament balked at passing legislation needed to give effect to a 1966 bilateral copyright agreement with the U.S. In resisting passage of the necessary legislation, the Thai government has chided our government for its failure to join Berne.

We believe that our nation's adherence to Berne will give the U.S. greater credibility when urging other countries to join Berne and to strengthen their own anti-piracy laws.

Similarly, U.S. adherence to Berne may also prove crucial to the success of efforts in the new round of GATT negotiations to create a method to enforce compliance with Berne-type standards of intellectual property protection. These efforts are of critical importance to U.S. intellectual property interests. As is true in our bilateral negotiations, our absence from Berne does not put us in the best posture to make this argument.

The Moral Rights Question

In the past, member companies of the MPAA and others in the film/TV industry expressed concern about the U.S. joining the Berne Convention. Basically, they were troubled that adherence would necessitate the enactment of federal moral rights legislation that would limit their freedom to produce motion pictures and television programs in this country.

To be frank, such concerns still persist. But two developments have occured that have moved those I represent today to the view that Berne adherence should be sought.

First, faced with the extraordinary increase in piracy in the past several years, we have come to realize that Berne would be an important tool in helping to cure the deficiencies in copyright protection that have permitted the unauthorized and uncompensated duplication of our products abroad.

Second, the law in the United States has evolved to the point that there is no need for Congress to enact moral rights legislation in order to satisfy the so-called "moral rights" requirements of Berne.

There now exists a clear consensus that the cumulative protection afforded authors under U.S. statutory and common law satisfies our obligations under Berne. The Administration; the Ad Hoc Working Group on U.S. Adherence to Berne (a blue ribbon panel of experts that worked under the auspices of the State Department); the Director of the World Intellectual Property Organization (which administers the Berne Convention); Ralph Oman, Register of Copyrights; Barbara Ringer, former Register of Copyrights; and other scholars and experts agree on this most important point.

The Ad Hoc Working Group summed up this issue best. After analyzing both the laws and court decisions on the federal and state level, the Group concluded:

> Given the substantial protection now available for the real equivalent of moral rights under statutory and common law in the U.S., the lack of uniformity in protection of other Berne nations, the absence of moral rights provisions in some of their copyright laws, and the reservation of control over remedies to each Berne country, the protection of moral rights is compatible with the Berne Convention. (emphasis supplied)

The message is clear and unambiguous: no federal moral rights law need be enacted for the U.S. to adhere to Berne.

Moreover, if a moral rights provision were inserted into the implementing legislation, it could have the effect of shattering the consensus that has emerged in this country that we should join Berne. Senator Leahy alluded to this point at the time he introduced his own Berne bill, S. 1301:

> Any moral rights amendment to the Copyright Act would be highly controversial. The debate on any such proposal could be a contentious distraction from the effort to bring the United States into the Berne Convention. Whatever the merits of various proposals to strengthen protection for moral rights under the Copyright Act, none of them would advance the goal of Berne adherence which is the only object of this legislation. (emphasis supplied)

Mr. Chairman, Congress should forge ahead. It should not let the moral rights issue distract us from the overriding goal of Berne adherence. Specific moral rights proposals should be considered by Congress, if at all, separate and apart from the debate on Berne.

Conclusion

The confluence of two factors -- the emergence of piracy on a massive global scale and developments in our laws that leave no doubt that the U.S. satisfies Berne's moral rights requirements -- has prompted us to come out in favor of Berne adherence. But as I mentioned at the outset, our support is contingent on the manner in which the implementing legislation addresses the moral rights issue.

Specifically, it is absolutely critical that the implementing legislation, along with the appropriate legislative history, make crystal clear that:

1) the Berne Convention is neither self-executing nor directly enforceable in the U.S.;

2) the bundle of rights under current U.S. law satisfies Berne requirements in the "moral rights" area and adherence to Berne neither contracts nor expands rights granted under current domestic laws in this area;

3) private rights exist in this country only to the extent specifically provided for in U.S. domestic law, and without regard to any laws or practices of other Berne signatories; and

4) existing laws and the implementing legislation meet our obligations under Berne and no further legislation is necessary for that purpose.

Thank you for your consideration of our views.

Senator DECONCINI. Thank you, Mr. Brown, very much.
Mr. Neilly.

STATEMENT OF ANDREW H. NEILLY, JR., PRESIDENT AND CHIEF EXECUTIVE OFFICER, JOHN WILEY & SONS, INC.

Mr. NEILLY. Mr. Chairman, my name is Andrew Neilly. I appreciate the opportunity to testify as a publisher in support of legislation which would, at long last, make the United States a full member of the international copyright community. The views I express today are shared by the majority of American publishers of all kinds, many of whom have written to you and to Chairman Kastenmeier.

I am president and chief executive officer of John Wiley & Sons, an international publisher of books, journals and training programs for education and the professions, founded in 1807. Wiley's interest in international protection for authors and publishers has a long history. In the 1840's we were the first American publisher to offer royalties to foreign writers such as Thomas Carlyle and Elizabeth Barrett at a time when they enjoyed no protection in this country.

I joined Wiley in 1947 as a college traveler, calling on professors to sell textbooks. Over the years I have become familiar with publishing practices and author relations in the United States and abroad. I am former chairman of the Association of American Publishers, and in June I will assume the chairmanship of the International Publishers Association, whose members constitute the national associations of 43 countries of the free world.

Wiley, like other publishers, has seen its markets and its publications affected by the growth of English as the language of science and the preeminent contributions of the United States to research and development, literature, and education. Our publications address worldwide markets. Nearly one-third of our revenues are derived from exports, from licensed translations or materials produced by our foreign subsidiaries. We are part of an industry which exports not merely physical objects but ideas, ideals, knowledge, and creativity.

This economically and intellectually important market is dependent on an orderly system of national laws and international treaties. In countries not reached by that system, the cost of piracy to American industry is great—$1.3 billion per annum in 10 countries alone, according to a 1985 study by the Intellectual Property Alliance.

For example, during 1987 over 350 Wiley titles were included in printings of 2 million copies of pirated books in Korea. Unfortunately, we were in third place. This is a form of flattery that could be improved upon.

Since 1952 the United States has participated in this system through the UCC, whose lower standards were designed specifically to accommodate the 1909 Copyright Act. The higher standards of protection introduced in the 1976 act were intended to pave the way for our accession to Berne. It is Berne, and not the UCC, which establishes the high standards of protection which prevail throughout much of the world and which we would like to see established worldwide.

Perhaps the most compelling advantage of Berne membership is the opportunity to exert leadership in the councils of international copyright. Evolving technologies and continued pressure for access to knowledge and information will force debate and require that these new issues be addressed. We want our Government to be able to participate fully in the resolution of these issues.

In addition, Berne provides support and credibility for trade initiatives such as GATT, GSP and CBI, further protection in fighting piracy, and the effectiveness of these efforts is derived from Berne's high standard of protection.

I find it particularly significant that the People's Republic of China is considering adherence to Berne. By the turn of the century there will be more people using the English language in China than in the United States, but today the number of books and journals which Wiley is able to sell or to copublish in China is exceeded many times by the copies, printed without authorization and without remuneration to either author or publisher.

Finally, I believe there is a moral imperative to this question. How can we encourage others to adopt and maintain effective and comprehensive copyright laws? How can we complain with conviction and credibility that poorer nations fail to respect our property rights? How can we claim to have a voice in the development of international copyright systems if, after careful preparation and with every encouragement from abroad, we reject this historic opportunity?

You will hear from a segment of the publishing community that adherence to Berne would alter longstanding commercial practices and the balance between the rights of authors and publishers. I am satisfied that Berne adherence need not affect these relationships. All of the bills before you contain the appropriate provisions, as I believe they must, to ensure that adherence would not affect U.S. domestic law.

As a practical matter, credits to authors and changes in content in revisions or adaptations, or the editing of multiauthor books or journals, are resolved through contract provisions or negotiations.

Senator DeConcini. Mr. Neilly, will you please conclude?

Mr. Neilly. All right.

Senator DeConcini. Thank you.

Mr. Neilly. I will skip the rest.

In closing, I am proud to add my support to that of the other members of the coalition, the national committee and others who strongly urge that the United States adhere to Berne. Thank you.

[The prepared statement of Mr. Neilly follows:]

STATEMENT OF ANDREW H. NEILLY, JR.
FOR JOHN WILEY & SONS, INC.

Mr. Chairman, my name is Andrew Neilly. I appreciate this opportunity to testify, as a publisher, in support of legislation which would at long last make the United States a full member of the international copyright community through adherence to the Berne Convention. I know that the views I express today are shared by the majority of concerned American publishers of trade, school, college, reference, professional, and scientific and technical books and journals, many of whom have written to you and to Chairman Kastenmeier.

I am President and Chief Executive Officer of John Wiley & Sons, Inc., a leading international publisher of books, journals, training programs, and other materials for education and professional development founded in 1807. Wiley's interest in international protection for authors and publishers also has a long history. In the 1840's we were the first American publishers to offer royalties to foreign writers such as Thomas Carlyle and Elizabeth Barrett, at a time when they enjoyed no protection in this country. In 1972 our Chairman, W. Bradford Wiley, testified before this body on a panel in support of accession to the Paris text of the Universal Copyright Convention. I hope that today's hearings will lead to the logical next step of adherence to Berne.

I joined Wiley in 1947, as a "college traveler," calling on college professors to sell textbooks. Over the years I have become familiar with publishing practices and author relations in the United States and abroad. I am a former Chairman of the American Association of Publishers. As of this June, I will assume the Chairmanship of the International Publishers Association, whose members constitute the national publishing associations of 43 countries of the free world, and whose principal goals include freedom to publish and the protection of copyright.

Wiley, like other publishers, has seen its markets and its publications affected by the growth of English as the language of science and the preeminent contributions of the United States to world literature and education. More and more, our publications address worldwide markets. We established our first foreign subsidiary in 1959; today nearly one-third of Wiley's revenues from publications and training programs are derived from exports, from licensed editions in, at last count, forty-seven foreign languages, or from publications and other materials produced by foreign subsidiaries in England, Canada, Australia, Japan and other countries. We are part of an industry which exports not merely physical objects, but ideas, ideals, knowledge, and creativity.

This economically and intellectually important market is dependent on an orderly system of national laws and international treaties. In countries not reached by that system, the cost of copyright piracy to American industry is great--$1.3 billion in ten countries alone according to a 1985 study by the Intellectual Property Alliance. As a specific and by no means unusual example, during 1987 over 350 Wiley titles were included in printings of 2 million pirated textbooks in Korea.

Since 1952 the United States has, of course, participated in this system primarily through the Universal Copyright Convention, whose lower standards were designed specifically to accommodate our 1909 Copyright Act. The higher standards of protection introduced under the 1976 Copyright Act and the subsequent expiration of the Manufacturing Clause were intended to pave the way for United States accession to Berne. It is Berne, and not the UCC which establishes the high standards of copyright protection which prevail through much of the world, and which we seek to have established worldwide. In an age when new technologies and growing international markets require increasing vigilence of copyright interests and put an increasing burden on international copyright systems, I believe that United States accession to Berne is essential.

In the long run, perhaps the most compelling advantage of Berne membership is the opportunity to exercise leadership in the principal councils of international copyright. Nothing is more certain than that evolving technologies and continued pressure for access to knowledge and information will force debate and require that new issues be addressed. The American copyright industries want our government to be able to participate fully and effectively in the resolution of these issues, and to insure at the very least that any effort to reduce present levels of protection is defeated. Membership in the UCC alone can not satisfy this need.

In addition, Berne provides support and credibility for trade initiatives such as GATT, GSP, and CBI, for the purpose of improving intellectual property protection and fighting copyright piracy. The effectiveness of these efforts are derived from Berne's high standard of protection, the absence of which would subject these trade negotiations to endless debate over the degree of protection to be afforded.

Berne adherence would also automatically afford protection in 24 additional countries which are not members of the UCC.

I find it particularly significant that the People's Republic of China is considering adherence to Berne in connection with the development of its copyright law. By some estimates, the turn of the century will see more people who use the English language in work or education in China than in the United States. That represents a considerable opportunity for American publishers if the Chinese join Berne as expected. Today the number of books and journals which Wiley is able to sell or copublish in China is exceeded many times by the copies, particularly of textbooks, printed without authorization, and without remuneration to us or to our authors.

Finally, I believe there is a moral imperative to this question. How can we encourage others to adopt and maintain effective and comprehensive copyright laws, how can we complain with conviction and credibility that poorer nations should respect our intellectual property rights, how can we claim to have a voice in the regulation and development of international copyright systems, if--after long preparation at home and in spite of every encouragement from abroad--we reject this historic opportunity to at last become a full member of the copyright community?

You will hear from a segment of the publishing community which has expressed concern that United States adherence to Berne would alter long standing commercial practices and the balance, as reflected in our system of federal and state laws, between the rights of individual authors and those of publishers. I am satisfied that Berne adherence need not affect these relationships--a conclusion shared by the numerous other members of the National Committee for the Berne Convention, the Coalition for Adherence to Berne, other publishers, most copyright experts here and abroad, and WIPO itself. I note that all of the bills before you contain appropriate provisions--as I believe they must--to insure that adherence would not affect United States domestic law in this regard. Others have fully addressed the legal and technical aspects of the "moral rights" issue, but perhaps I can offer some insights on the basis of my experience in the publishing business.

As a practical matter, credits to authors, and changes to content necessary in revisions and adaptations, or in the editing, of complex multi-author textbooks and compilations such as journals, are resolved through appropriate contract provisions or through negotiation. Aside from the fact that Berne does not require Article 6 bis to be applied to works of domestic origin, I see no conflict between Berne minimum standards under 6 bis and traditional practices in this country. Our relationships with authors of our subsidiaries in England, Canada, and Australia--all Berne signatories with copyright systems similar to ours, are not more difficult than in the United States.

I do not see the relevance of the experience in countries such as France, which have a completely different approach to moral rights not mandated under Article 6 bis. I appreciate that the freedom to edit in a timely manner is critical to magazines and newspapers, but fail to appreciate how Berne legislation which expressly preserves current United States law could adversely affect those interests.

In closing, Mr. Chairman, I am proud to add my support to that of other members of the Coalition for Adherence to Berne, The National Committee for the Berne Convention, and others who strongly urge that the United States adhere to Berne. I believe that the views I have expressed represent the mainstream of the publishing industry, which joins with virtually every other segment of the copyright industries to support your efforts in this matter.

I will be happy to answer any questions from members of the Commttee.

Senator DECONCINI. Thank you, Mr. Neilly.

I have a few questions. Due to time constraints, I will submit some of them in writing. We would ask that the panel members answer them for us because I feel that they would help us in our deliberations.

Mr. Dam, what evidence do you have that foreign countries would be more scrupulous about protecting American copyright material if we were to join Berne?

Mr. DAM. Well, there are two aspects of that. First of all, because we are not in Berne, there are 24 countries with which the United States does not have copyright relationships. On paper, some of these countries may provide the kind of protection that is needed, but they don't have to provide it to us. There is the "back door" approach that I described, but it is expensive and it is uncertain. In any event, many American copyright holders really can't afford the simultaneous "back door" publication.

Aside from that, and one of the reasons why it is particularly important to move now, is that the U.S. Government has been moving actively on the bilateral level to assure higher levels of protection and more enforcement against piracy in many foreign countries. With many of them, the U.S. Government needs membership of the United States in order to be effective in those negotiations.

Perhaps there's nothing more important than this: in order to really make progress over the long run, we have to have some sort of an agreement within the context of the GATT. Those GATT negotiations are going forward right now, but until the United States is a member of Berne, we cannot credibly insist that others give us the kind of protection we deserve.

Senator DECONCINI. Would you supply us for the record, Mr. Dam, some specific examples of situations where you feel piracy has been imposed on your company?

Mr. DAM. We would be glad to provide materials for the record on that subject. There have been a number of studies of that sort of thing, too, and perhaps we can refer to some studies. I know that the International Trade Commission has addressed the question of making an estimate of the losses for our industry.

Senator DECONCINI. Thank you.

Mr. Clemente, can you give us an example or two of instances in which your ability to enforce your intellectual property rights has been made more difficult by nonmembership in Berne?

Mr. CLEMENTE. Well, I would only be able to do that indirectly. In the area of attempting to convince countries such as—I will just use Indonesia as an example—there are currently bilateral efforts underway to convince Indonesia to pass a new patent law which would give greater protection to the pharmaceutical industry. In discussions with the Indonesians, both the Government and the private sector, we find ourselves really at a handicap in trying to get them to adhere to high standards on the patent side when we ourselves are not strong adherents to international conventions such as the Berne Convention.

It is simply a lack of credibility. We are sort of late in the arena, coming forward and saying, "You should raise your standards because internationally the standards are higher than those which you possess," so we are often met with the argument, as I said, before, "Well, how about the manufacturing clause?" Now that is gone, but now they will bring up the argument, "How can the United States be so sincere about intellectual property rights? It doesn't even join Berne."

Senator DECONCINI. Mr. Brown, the Directors Guild criticized the motion picture studios for their practice of requiring artistic authors to give up any moral and copyrights to the financing corporation. First of all, is this the common practice and, second, do you find it unreasonable that the party that puts up the money for a project has some say-so in how the project ultimately comes out?

Mr. BROWN. Mr. Chairman, most motion picture directors are engaged in an individual negotiation, and depending upon their ability and track record, can exact many clauses that protect their so-called moral rights, so——

Senator DECONCINI. Is it a common practice that they give them up, or is it a common practice that they do not?

Mr. BROWN. Certain of them are given up because the venture in which they are engaged is not their property. The description, for example, in the Directors Guild brief, that the authors of a film are the principal screenwriter and the director, simply is not according to my experience.

My experience is that a producer involves himself in developing an idea for a movie and engages a screenwriter, perhaps several screenwriters. They write a script. They then engage a director, and then this fusion of talents that I referred to make the movie, but basically they are not the sole authors of the movie.

In Europe it is more frequently the case that the director, so-called "auteur," is the author of the movie—such as, for example, an Ingmar Bergman movie.

There are a few directors in this country—Woody Allen is one—who do everything, but more commonly the director and the writer or writers are engaged by the financing unit and by the producer to work for hire and make the movie. Therefore, if they were to demand certain rights, it would be manifestly unjust because the people who put up the money and those who put up the idea would be deprived of their rights.

Senator DECONCINI. Are you telling us, then, that when there are a multiple number of people involved in the final product, then it is more likely that the studio will get the copyright for the picture or for the work of art or whatever?

Mr. BROWN. That is correct.

Senator DECONCINI. That is correct, and when there is a single one it is less apt to happen——

Mr. BROWN. Less apt to happen.

Senator DECONCINI [continuing]. But still subject to negotiation.

Mr. BROWN. Subject to negotiation and subject to the free process of power between individuals in the private sector.

Senator DECONCINI. Thank you, Mr. Brown.

Mr. BROWN. Thank you.

Senator DECONCINI. Mr. Neilly, we have many witnesses testify in general terms on how U.S. membership in Berne would help to prevent piracy of U.S. works and strengthen our negotiation position at the GATT. I wonder if, as a publisher, you could offer some specific examples of how our absence from Berne has hurt your business and how our membership in Berne would in fact help your business?

Mr. NEILLY. Well, I think first of all that those members, those countries who are members of the UCC, are required only to provide the protection to other countries' nationals that they give to themselves, and in some cases these are minimal standards which are not very helpful in international relations. We would certainly see that if the Chinese, seeing us become members of Berne, therefore decided to join Berne, this would be exceedingly helpful. This is the largest market in the world for books and journals, if it could be made economically viable.

Senator DECONCINI. Do you have any examples of where your business has been hurt by the fact that the United States is not a member of Berne or the fact that the People's Republic is not a member of Berne?

Mr. NEILLY. Oh, indeed. There is just rampant copying. The Chinese have no copyright law whatsoever.

Senator DECONCINI. Would you like to supply some examples for the record for us?

Mr. NEILLY. We could certainly do that. Of course, Taiwan and Korea and a variety of other countries have been notorious for their piracy.

Senator DECONCINI. I have heard that testimony and read it many times, but if I have seen the specifics I have forgotten about them. I would like to have them for the record, if you could provide us a few cases of that.

Mr. NEILLY. We would be pleased to provide that.

Senator DECONCINI. Thank you.

I yield to the Senator from Iowa for any questions he may have.

Senator GRASSLEY. Thank you, Mr. Chairman.

Mr. Dam, as I understand the position of your organization, then, you oppose any addition of moral rights to American law that would be through our adherence to the Berne Convention.

Mr. DAM. We think that this is not the forum for addressing the moral rights issue. It is unnecessary to do so at this time and it could only delay adherence.

Senator GRASSLEY. Yes, and from that standpoint, then, you believe that the current bills before us are sufficient in restricting moral rights?

Mr. DAM. I think that they leave the moral rights issue where it is, so that it can be considered independently and on its merits. That is the general view I have.

Senator GRASSLEY. Now I have some concerns about importing the concept of moral rights into our law, and I think that it is possible that by using terms like "moral rights," that we may be acknowledging that American law recognizes them. In other words, I would prefer to keep the debate on another level, let's say, like the equivalents of so-called moral rights, I think in terms of the law of libel and slander or the trademark acts, along that line.

Could you give me your view of that if you have had a chance to think about it? If you haven't, then I will ask for your response in writing, if you——

Mr. DAM. Well, let me say that in a general way, what is referred to in some countries as "moral rights" can be found in our own law. We have the common law, we have specific provisions of specific Federal statutes, we have court decisions. They don't add up like a jigsaw puzzle into an absolutely complete picture of moral rights, but they certainly create a base from which many authorities have concluded that our law already complies and is fully compatible with the Berne Convention. Even the Director General of the World Intellectual Property Organization, which is the secretariat for the Berne Convention, has expressed that opinion in writing.

Senator GRASSLEY. Now I take in good faith your view of the issue before us, both that you don't want us to deal with anything in the legislation on moral rights, as well as the fact that it is fully accommodative of the concerns of most people. Now in light of the fact that Senator Hatch, in his opening statement, said that he might be proposing or will be proposing restrictive language concerning moral rights, I would like to have your view in light of the question I just asked you.

In trying to accommodate my concern, would it be possible to insert language in a bill which would be more precise on this issue of so-called moral rights, and in relationship to what Senator Hatch says? I guess I need your reaction to that.

Mr. DAM. Well, I am sorry Senator Hatch isn't here because I do think that he is attempting to resolve this issue, but I have some serious reservations about the specifics—not the intention but the specifics—of his proposed amendment.

Let me make clear at the beginning the reason why IBM and so many others think that this issue should not be addressed. It is simply because we think it is such a high priority to our industries, to the U.S. balance of payments, to move on the piracy question. The moral rights issue is so contentious that to address it in this legislation, we believe, would run a very, very serious risk of simply putting the whole question of Berne adherence off to future years. We think that would be really disastrous from an economic point of view.

So that is what we are concerned about, and we believe that the broad range of opinion in this country and in this economy concurs in that view. There are people at one end of the spectrum or the other who do not, but in general that is the broad majority opinion.

Now this legislation is specific. It is specific in saying that the Berne Convention is not self-executing. Even if the legislation did not say so specifically, there are many principles of American law which lead to the same conclusion. But the bills are very specific on that point.

Once you go beyond that and start talking about what the level of moral rights should be, then I think you get right into the dilemma I have indicated. The actual provisions that Senator Hatch has brought forward, when you look at them, do make some statements that are bound to be contentious, such as in one provision, the draft 306(b), which says that after the effective date of this act there will not be "any moral rights under any Federal or State statutes or the common law." I am sure that provisions like that are going to raise controversy on the other side, on the other extreme. So I think that approach is not a practical way to proceed if the objective is to stamp out piracy.

Senator DeConcini. Can I ask you, then, for a conclusive statement whether or not you would be opposed to, then, the discussing of some language which might be more restrictive on this point?

Mr. Dam. Yes, indeed, opposed because of the desire to move this legislation forward now.

Senator DeConcini. Thank you.

The Senator from Vermont?

Senator Leahy. Thank you, Mr. Chairman.

Mr. Neilly, Mr. Brown, Mr. Clemente, Mr. Dam, I appreciate you all being here. Your testimony has been valuable to us.

A couple of you have mentioned China this morning. I find it interesting that after the turn of the century there will be more people in China speaking English than there are in the United States. That speaks well for their educational system. When you take the number of people in our country who even learn a second language, it says something of the laziness of our own educational system, but that is a different subject.

We have in the audience this morning a delegation of copyright experts from China. They are in this country to study copyright protection for computer software, and I welcome them to this hearing. I am delighted they are here. I hope they profit from the opportunity to see how a democratic society debates proposals to change the copyright law.

As I understand it, China is considering joining the Berne Convention. If China joins Berne—let me start with you, Mr. Dam—if China joins Berne but doesn't join the Universal Copyright Convention, what would be the impact on access to the Chinese market for American software firms?

Mr. Dam. Well, I am sure that there are technical aspects of that, and I would like to be able to supplement my answer for the record——

Senator Leahy. Of course.

Mr. Dam [continuing]. Once we have had a chance to look at that specific question, but in general Berne offers the highest standard of copyright protection, and therefore that is the most important thing in means of assuring an adequate level of protection. Certainly the Chinese market for software is important today, but it will become very much more important in the future. Therefore I think that Berne adherence is a very important step in furthering economic interchange with China and bringing about closer relations between the two economies.

Senator Leahy. If the United States and China both join Berne, would that enhance our access to their market?

Mr. Dam. It enhances our access in the sense that American firms are more likely to be relaxed about selling software in China, and fear less the possibility of copying. I am sure that is true. I suppose that without Berne they could still market in China and take their chances, but adherence to Berne by both countries would mean that American firms would not have to take those chances.

Senator Leahy. Do you see any real downside to your industry if we joined Berne?

Mr. Dam. No, I don't. I think it is a very, very important step for our industry. I noticed that in the latest report of the International Trade Commission, issued just last week, the industry which was described as "computers and software" was the largest victim of intellectual property law inadequacies outside of the United States—according to this estimate over $4 billion annually in lost revenues on foreign sales. Obviously the great importance of adherence is underlined by those figures, and I really don't see any downsides.

Senator **Leahy**. Do you agree with me that this question of trying to lock out any consideration of moral rights in this legislation is unnecessary, when we ought to be just looking at the question of Berne?

Mr. **Dam**. It is unnecessary, to be sure, because for many reasons—which have been gone into in the testimony of various witnesses—Berne would have no impact on the status of moral rights in the United States. Our law would remain unchanged under this legislation, and therefore it is unnecessary to address that question.

To be sure, the status of moral rights in the United States is an issue on which many people have strong opinions, but that can be decided under other legislation. I understand there already are bills on this subject unrelated to Berne adherence, so it is not necessary to confront that issue here.

Senator **Leahy**. And one last question: Mr. Brown, you described the difficulty you had with Thailand with the movie "The Sting," which I might say was a movie I enjoyed very much. You had to try to go the "back door" route under Berne by opening it or publishing it in Canada as well. As I understand it, the Thai courts ruled that it wasn't simultaneously published in Canada and thus got around the copyright issue. Is that correct?

Mr. **Brown**. That is correct, Senator, and it is a very cumbersome process in other markets, too, to assure maximum protection without Berne.

Senator **Leahy**. If we had been under Berne, you never would have had to go through the Canadian route or have the fight in the Thai courts, is that correct?

Mr. **Brown**. That is correct. It put us in the unconscionable position of using back doors to stop other people from using back doors.

Senator **Leahy**. Thank you.

Thank you, Mr. Chairman.

Senator **DeConcini**. Thank you.

The Senator from Alabama?

Senator **Heflin**. In regard to simultaneous publication, where you publish a film or a book in a Berne member country at the same time you do in the United States, can a remedy be obtained by increasing the judicial assistance treaties that we have with other countries, or is it just an impossibility under other ways to have your proof? The difficulties that you now experience with simultaneous publication, can they be approached from a different manner than just the Berne treaty?

Mr. **Dam**. Well, perhaps——

Senator **Heflin**. Yes. Particularly, you have a particular problem with software, I would think.

Mr. **Dam**. I don't see that judicial assistance deals with two main factors. The first is that it is cumbersome and expensive to engage in simultaneous publication. Without simultaneous publication, there is no hope of receiving Berne rights in a Berne country.

Small companies simply do not have the wherewithal to do that, so they have no hope of protection.

Even if one does publish simultaneously and is very careful about it, as the Thai example just referred to shows, it is uncertain. The other Berne country may not recognize simultaneous publication. There are also problems of proof, so while judicial assistance is very much to be welcomed as an approach, I don't see that it solves this problem.

Senator HEFLIN. Under the moral rights provision, would there be difficulties in determining who the authors of a software package are? Is the software field similar to the movie field in that regard? What distinctions would there be relative to that, Mr. Dam?

Mr. DAM. Well, I think it is clear that the writing of software is even more a group enterprise. Most software today is done by teams, and under the copyright law, it is generally the team's employer that holds the copyright. Many of these are very small companies, though. It may be just a few people who are working together. It is an industry in which there are not great economies of scale, and so there are thousands of software companies in the United States alone. They generally publish that software through a corporation, and that corporation holds the copyright.

Senator HEFLIN. Is there any similarity between architectural manipulation and mutilation under the provisions of Berne as opposed to the software industry?

Mr. DAM. Well, I would be the first to admit that I am not a copyright lawyer, and therefore I would like to be able to answer that question for the record, if I might, so that I can consider it carefully.

Senator HEFLIN. All right. That's all.

[Responses of panel members to written questions by committee members, subsequently submitted for the record, follow:]

RESPONSES OF KENNETH W. DAM
TO QUESTIONS RAISED BY COMMITTEE MEMBERS

QUESTIONS FROM SENATOR DeCONCINI

(1) WHAT EVIDENCE DO YOU HAVE THAT FOREIGN COURTS WOULD BE ANY MORE SCRUPULOUS ABOUT PROTECTING AMERICAN COPYRIGHTED MATERIAL IF WE WERE TO JOIN BERNE?

Answer:

According to the August, 1985 Report of the International Intellectual Property Alliance to the United States Trade Representative on "Piracy of U.S. Copyrighted Works In Ten Selected Countries," Egypt and Thailand are two clear examples of countries that are members of Berne, but not of the Universal Copyright Convention, where works of other Berne countries receive better protection than works of non-Berne countries.

As to Egypt:

> In recent raids involving pirated books the Egyptian police seized pirated British books. . . but refused to seize American books. It has been presumed that this refusal is based on a lack of understanding on the police's part that since most American publishers simultaneously publish in a Berne country (typically England or Canada), under the terms of Article 3(4) of Berne, these works are entitled to protection in Egypt.

Report by the International Intellectual Property Alliance to the United States Trade Representative (August 1985), Section of Appendix on Egypt, p.2.

As to Thailand, Thai public prosecutors have taken the position that the 1937 Treaty of Amity and Economic Relations between the United States and Thailand is not enforceable and that they will take cases involving American works only if they can establish "back-door" eligibility. In addition to the common practical difficulties establishing proof of first or simultaneous publication in a Berne country, Thailand also requires that local licensees have a power of attorney signed by the American copyright owner. *Id.*, Section of Appendix on Thailand, p.5. On the difficulty of proving "simultaneous publication" in Thailand, see also my written testimony at p.7 note 1.

These examples show that foreign customs officials, prosecutors and judges *are* more scrupulous about protecting copyrighted materials when the country of origin is a Berne member. Thus, Berne adherence will directly improve our ability to control piracy in such countries. In addition, since international piracy will not end merely because the U.S. joins Berne, we must be mindful of the further benefits of adherence, beyond the immediate advantages: for example, Berne adherence will serve to combat international piracy by enhancing U.S. leadership in the international copyright community and by strengthening the U.S. bargaining position in bilateral and multilateral trade negotiations.

(2) DO YOU HAVE ANY EVIDENCE THAT BERNE COUNTRIES HAVE BEEN GRANTED BETTER PROTECTION IN OTHER BERNE COUNTRIES THAN THE U.S. HAS? WHAT WOULD YOU SAY TO THE ARGUMENT THAT IF A NATION'S COURTS HAVE COUNTENANCED PIRACY IN THE PAST, THAT OUR JOINING BERNE WILL NOT MATTER TO THEM?

Answer:

See answer to Question No. 1.

(3) IN WHAT WAYS DO YOU ENVISION THAT U.S. ADHERENCE TO BERNE WILL DIRECTLY AFFECT IBM'S ABILITY TO CONTROL PIRACY OF ITS PRODUCTS?

Answer:

See answer to Question No. 1.

(4) AS SOMEONE WHO IS QUITE KNOWLEDGEABLE POLITICALLY, WHAT DO YOU THINK THE EFFECT OF ADDING A STRONG MORAL RIGHTS PROVISION TO THIS LEGISLATION WOULD BE ON THE CHANCES THAT THE U.S. COULD JOIN THE BERNE CONVENTION?

Answer:

The effect would be to destroy any chance that the U.S. could join the Berne Convention this Congress.

Currently, there is a broad consensus of support for Berne adherence; but there is no consensus in the U.S. either for increasing moral rights protection or for cutting back the levels of protection already available under U.S. law. The constituencies supporting Berne adherence include groups with quite different positions on various moral rights questions. They have all joined in support of Berne adherence because they understand -- correctly -- that U.S. law already complies with Berne on moral rights, and that Berne adherence will neither increase nor diminish the levels of moral rights protection in U.S. law. That broad consensus would be torn apart if the issues of Berne adherence and stronger moral rights protection were unnecessarily linked in the enabling bill.

Moreover, it is a very complicated matter to reach a consensus among advocates and foes of moral rights over an acceptable definition as to what they do and do not mean by the term, and a fully acceptable identification of each and every one of the possible elements of moral rights protection (or analogs thereto) in current U.S. law. To say that Berne adherence must await the sorting out of all these matters is to say there will not be Berne adherence this Congress.

QUESTIONS FROM SENATOR HEFLIN

(1) MR. DAM, IN YOUR TESTIMONY YOU STATED THAT IBM SPENDS $10 MILLION EACH YEAR ON SIMULTANEOUS "BACK DOOR" PUBLICATION. MR. BROWN, ALTHOUGH YOU DID NOT MENTION A SPECIFIC DOLLAR AMOUNT, YOUR TESTIMONY LED ME TO BELIEVE THAT THE MOTION PICTURE INDUSTRY SPENDS A COMPARABLE AMOUNT FOR SUCH PUBLICATION.

APPROXIMATELY HOW MANY CASES PER YEAR DOES IBM AND THE MOTION PICTURE INDUSTRY BRING WHERE THEY RELY UPON SIMULTANEOUS PUBLICATION TO PROTECTION THEIR RIGHTS? WHAT IS THE SUCCESS RATE IN THESE CASES?

Answer:

Relatively few piracy cases go to trial. Most matters are disposed of at preliminary stages. As shown by my discussion of the example of Egypt in my answer to Senator DeConcini's first question, simultaneous publication must often be proven before the enforcement process will begin. In order to have any chance to initiate enforcement procedures in these circumstances, IBM "simultaneously" publishes the vast majority of its published computer programs in the U.S. and either Canada or Denmark.

(2) MR. DAM, IN YOUR TESTIMONY, YOU STATE THAT YOUR DOMESTIC SOFTWARE VENDORS LOSE APPROXIMATELY $800 MILLION ANNUALLY IN OVERSEAS SALES DUE TO PIRACY.

HAVE YOU BEEN ABLE TO IDENTIFY THE MAJOR COUNTRIES WHERE THE SOFTWARE IS BEING ILLEGALLY REPRODUCED? IF SO, DO YOU THINK THAT THEY WILL STOP THEIR OPERATIONS SIMPLY BECAUSE WE JOIN BERNE?

Answer:

Many of the major countries where pirated software is illegally reproduced are members of Berne. As to the direct and long-term advantages to Berne adherence see my answer to Senator DeConcini's first question. I would like to reiterate, however, the importance to the U.S. of Berne adherence as we move through the forthcoming GATT Round of trade negotiations. It is our hope that adherence to the high Berne standards will help the U.S. in its efforts to raise the level of debate over the importance of intellectual property protection and help the creation of strong enforcement mechanisms.

(3) IF THE U.S. JOINED BERNE, WOULD IBM HAVE TO DEFEND CLAIMS OF MUTILATION WITH RESPECT TO COMPUTER SOFTWARE -- AS, FOR EXAMPLE, A BUILDING OWNER MIGHT HAVE TO DEFEND CLAIMS BY AN ARCHITECT FOR SUBSTANTIAL ALTERATIONS TO A BUILDING?

Answer:

As I explained in my testimony, if IBM mutilated another author's work in the course of publishing it -- either a computer program or any other work -- we would be no less susceptible to any moral rights claims, than any other publisher. We aren't asking others to take on risks of Berne adherence while we reap the benefits. However, because IBM has encountered no significant problems in the U.S. or elsewhere in the world in connection with moral rights, and the implementing legislation makes clear that Berne adherence will not expand or reduce moral rights in the U.S., we do not perceive a risk.

Of course, in many instances programs or other works are created by employees of IBM, and IBM is legally the author under the "work made for hire" provisions of the Copyright Act. With regard to those works, we are more like the magazine publisher -- who, under the Act, is usually the "author" of its publications and thus owns any moral rights in them -- than we are like the building owner, who is usually not the architect's "employer."

QUESTIONS FROM SENATOR LEAHY

(1) IF THE PEOPLE'S REPUBLIC OF CHINA (PRC) JOINS BERNE (BUT NOT THE UNIVERSAL COPYRIGHT CONVENTION (UCC)), HOW WILL IT AFFECT MARKETING OF SOFTWARE IN CHINA?

Answer:

Until the United States joins Berne, copyright protection for a U.S. computer program in China would have to be achieved through simultaneous publication in a Berne country. (This assumes that, as currently contemplated, Chinese law will cover computer programs.) As I explained in my statement, such publication is expensive and uncertain; but, in order to get protection in the growing Chinese market, American software producers would have to go through that costly process even if there were no other business reason for simultaneous publication.

The cost could put American software producers at a competitive disadvantage in comparison to their Japanese and Western European counterparts. Courts in China and other foreign countries may also look even less favorably on U.S. proprietors' continued use of "back door Berne" if we reject Berne now.

Moreover, those companies that fail to publish copyrighted works simultaneously -- either because they did not realize the benefits of Berne protection, or did not anticipate entering the Chinese market at the time of first publication -- would have a substantial disincentive to introducing those works into the Chinese market, where they might have no copyright protection.

Of course, even a company that does not choose to market in China may suffer the effects of piracy there, since computer programs could easily be duplicated there not only for marketing in the PRC but also for export to other countries. Again, U.S. software producers would be at a competitive disadvantage in comparison to their Berne colleagues whose programs would be protected without having to go through simultaneous publication.

Finally, broad availability of cheap, pirated copies of computer programs that cannot be suppressed would certainly work to the detriment of all software firms trying to license competitive programs in China. That includes both U.S. and foreign firms, but since the U.S. is the world's largest software producer, the U.S. would likely suffer the greatest harm.

(2) YOUR TESTIMONY MAKES CLEAR THAT IBM HAS SUBSTANTIAL COPYRIGHT INTERESTS IN A HOST OF MEDIA, FROM TRADITIONAL PRINTED PUBLICATIONS TO FILMS. BUT OF COURSE, IBM IS MOST CLOSELY ASSOCIATED WITH HIGH TECHNOLOGY IN GENERAL, AND WITH COMPUTERS IN PARTICULAR.

WE OFTEN HEAR THAT OUR FUTURE COMPETITIVENESS WILL BE DETERMINED BY HOW WELL WE CAN COMPETE IN HIGH TECHNOLOGY. HOW WILL HIGH TECHNOLOGY INDUSTRIES, AND THE U.S. COMPETITIVE POSITION IN HIGH TECHNOLOGY, BENEFIT FROM U.S. ADHERENCE TO THE BERNE CONVENTION?

Answer:

Software created by U.S. high-tech companies represents an important element of U.S. competitiveness. In IBM's case it is the fastest growing part of our business. I testified software produced some $5 billion in revenue for IBM. Our latest annual report shows that figure to now be over $6.8 billion, a considerable jump in one year.

This is by no means a unique IBM story, it is replicated throughout the industry. It is an area where U.S. high-tech companies can and do compete most effectively. Yet, that very competitiveness is threatened by piracy, and, as I noted in my testimony, the ease with which software can be pirated is inversely proportional to the cost and effort required for its creation.

(3) THE SUPPORT FOR BERNE THAT YOU EXPRESSED IS SHARED BY A BROAD CROSS-SECTION OF AMERICAN INDUSTRY. BUT THERE ARE A FEW DISSENTERS.

THE DISSENTERS APPEAR TO BE ON OPPOSITE ENDS OF THE SPECTRUM, BUT IN A SENSE THEY ARE BOTH SAYING THE SAME THING: WE SHOULD TAKE ADVANTAGE OF THE MOMENTUM IN SUPPORT OF BERNE TO ENACT SPECIFIC PROVISIONS ON THE QUESTION OF MORAL RIGHTS.

WHAT WOULD HAPPEN TO THE EFFORT TO JOIN BERNE IF WE PAUSED NOW TO HAVE A DEBATE ON FEDERAL LEGISLATION ON MORAL RIGHTS?

Answer:

See answer to DeConcini Question No. 4.

(4) YOU REPRESENT A BROAD AND DIVERSE COALITION, WHOSE INDIVIDUAL MEMBERS MIGHT HAVE DIVERGENT VIEWS ON THE MERITS OF PARTICULAR LEGISLATIVE PROPOSALS IN THE FIELD OF MORAL RIGHTS. IS IT ACCURATE TO SAY THAT ALL THE MEMBERS OF THIS COALITION HAVE AGREED TO PUT THOSE OTHER AGENDAS ASIDE FOR THE TIME BEING TO CONCENTRATE THEIR EFFORTS ON THE IMMEDIATE AND PRESSING GOAL OF BRINGING THE UNITED STATES INTO THE BERNE CONVENTION?

Answer:

Your statement is accurate.

March 14, 1988

RESPONSES BY DAVID BROWN TO QUESTIONS POSED BY SENATOR DECONCINI

1. Question:

In your written testimony you expressed your concern with piracy. Could you please briefly explain what is curently done to combat piracy. In what way would adherence to Berne strengthen your efforts?

Answer:

The Motion Picture Association of America considers the piracy of copyrighted motion pictures and television programs to be one of the most serious problems facing our industry. For that reason, MPAA spends enormous time and money, both here and abroad, to combat the stealing of our product by unscrupulous pirates.

More specifically, since 1975 MPAA, on behalf of member companies, has directed a comprehensive worldwide anti-piracy program. MPAA maintains 18 film and video security offices in nations throughout the world, including Australia, Brazil, Canada, Colombia, Italy, New Zealand, the Philippines, Singapore, South Africa, Turkey, Taiwan, United Kingdom, The United States and Venezuela.

The MPAA's anti-piracy program has several objectives: (a) improve security methods designed to prevent theft of our product; (b) strengthen copyright protections in the U.S. and foreign countries; (c) to assist local governments in the investigation and prosecution of piracy cases and (d) to provide technical support in the the criminal and civil litigation generated by such investigations.

In addition, MPAA lawyers and investigators work with local anti-piracy organizations composed of producers, distributors and retailers in more than 40 countries. One way or another, our anti-piracy program operates in nearly 60 nations worldwide.

Despite this enormous effort, MPAA has learned that "self-help" is not enough. Unless the federal government actively joins the campaign against piracy, there is little hope of making any real progress against this evil. For that reason, over the past several years, MPAA along with others in the intellectual property community, has encouraged the federal government to help better protect U.S. intellectual property both here and abroad.

For example, MPAA successfully urged the Congress to enact legislation dramatically increasing the penalties for video pirates in this country.

On the international front, MPAA has successfully lobbied Congress to adopt amendments to the Carribbean Basin Initiative and the 1984 Omnbius Trade Act that are intended to enhance protections for American intellectual property abroad. Moreover, in the near future House and Senate conferees will take up H.R. 3, the pending trade bill, that contains intellectual property protections that build on those found in earlier laws.

In my written statement (pp. 5-8) I set forth the advantages that U.S. adherence to Berne would mean for the fight against film and video piracy.

2. Question:

The Director's Guild criticizes motion picture studios for their practice of requiring artistic authors to give up any moral or copyrights to the financing corporation. (a) Is this a common practice? (b) Do you find it unreasonable that the party that puts up the money for a project has some say in how that project comes out?

Answer:

(a) Individual employment contracts and the directors guild agreement reflect the fact that an employer-employee relationship exists between a director and producer. Under our copyright law the producer/employer is the author/copyright holder. Nonetheless, given the strength and status of their powerful union, the directors have gained through collective bargaining myriad moral rights type protections in their DGA agreement.

In addition, in many instances a director's employment contract contains such protections as well. Thus, it is wrong to assume that directors are without any such protections.

(1). The DGA Agreements. These agreements are negotiated by the Alliance of Motion Picture and Television Producers representing a variety of producers of motion pictures and TV programs and the Directors Guild of America, a powerful labor union representing the collective strength of thousands of directors.

Over the years, the directors have succeeded in gaining through labor negotiations detailed "moral rights" type protections in the DGA contract. For example, directors have broad rights to have their name prominently displayed when a film is shown theatrically or on videodiscs or videocassettes [screen credit], when their work is advertised, or when a record, tape or book, of the film is licensed and distributed by the producer.

(2). Individual Employment Contracts. The DGA guild agreements represent only the minimum protections afforded directors. Many directors have individual contracts with studios that give them "moral rights" type protections that go well beyond those contained in the guild agreements. These rights could include whether or not the film should be shown on commercial TV or released on videocassette. In some instances, these rights even include final "cut" -- the determination of the version to be released.

These numerous provisions in the DGA agreement and myriad employment contracts belie any assertion that the directors are somehow routinely forced by the producers to give up any "moral rights" type protections.

(b) The motion picture industry is a high-cost and high-risk business. The cost of producing a film to an MPAA member company is now over $20 million dollars, up 113% since 1980. MPAA member companies also spend about $9 million for advertising and print costs. At the same time, it is estimated that 2/3 of MPAA member films, never recover their production costs. Certainly, it is entirely reasonable for those who expend such enormous sums, with such a limited prospect of recovery, to have "some say in how that project comes out."

I feel compelled to inject an additional thought. At the hearing the suggestion was made that producers are only involved in the financing end of the project. That is simply not true. Many producers, such as myself, are in a very real sense "creative producers." We are an integral part of the creative process. We develop ideas from scratch that later make their way onto the screen. We work closely with those who take our ideas and help transform them into vibrant motion pictures. We are not simply "money men," and I, for one, bristle at the suggestion.

3. Question:

The Subcommittee will receive testimony later today to the effect that the argument that the U.S. does not have to expand moral rights to comply with Berne is more outlandish or blatant than any film fantasy. The Directors Guild says that this argument for the status quo is a "magical notion" invented in a "massive and cynical act of self service" and that it has no basis in fact.

How do you explain this disagreement. Is their interpretation of the law any more or less self serving than yours? On this particular issue -- of what changes are required in domestic copyright law in order to comply with Berne -- don't you think we should look to the advice given by copyright owners and not producers, publishers, directors or writers?

Answer:

The DGA's assertion that existing law does not satisfy the "moral rights" requirements of Berne [Article 6bis] places the guild in a distinct minority.

The overwhelming number of those who have considered the issue have concluded that the bundle of rights available under U.S. and state statutory and common law is sufficient for purposes of Article 6bis.

Included among those who believe U.S. law is adequate for this purpose are many who do not have an economic axe to grind and thus whose views cannot in anyway be characterized as self-serving, including the Register of Copyrights, a former Register of Copyrights, the chairman and ranking member of the House Copyrights Subcommittee, members of this Subcommittee and representatives of the Administration.

THE NEW REPUBLIC
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SPIELBERG'S LAMENT

Last week the men who brought you gremlins and wookies came to Washington to defend America from bad taste. The producer-directors Steven Spielberg and George Lucas testified before a Senate subcommittee against all forms of tampering with original works of art without the permission of the artist. "Art is a distinctly human endeavor" is how Lucas elegantly put it. "We must have respect for it if we are to have any respect for the human race." Spielberg and Lucas are lobbying for a federal law guaranteeing the "moral rights" of artists—as well as their contractual and economic rights—to the work they have produced.

What Lucas means by moral rights is actually quite specific. He and other artists claim that regardless of who owns their work or its copyright, they have transcendental rights to its "paternity" and "integrity." According to the Berne Convention, an international copyright treaty the United States is about to join, authors have an overriding right to insist that a work be attributed to them; they can also object to any distortion or damage to the work that harms their artistic reputation.

If a law were passed enforcing these rights, Frank Capra's estate could legally sue the studio for the colorization of *It's A Wonderful Life* if they didn't like the look of a bright pink Jimmy Stewart. With "moral rights," Sir David Lean could make sure his *Doctor Zhivago* couldn't be spliced to fit a late-night movie slot. Boris Pasternak, in turn (if he were alive), could sue to prevent the choice of Julie Christie as Lara. The painter whose restaurant mural was wrecked by a door being constructed in the middle of it could sue the owner. In theory, egocentric journalists could take TNR to court for messing around with their copy.

Even under current law, any artist is free to negotiate such rights as part of the contract when he or she sells the work in question. Woody Allen negotiated a contract that allows him to retain complete control over his work. In principle, any artist can do that. Even without such a contract, the right to correct attribution is so basic (it has been upheld in a couple of cases) that it is implicit in any current copyright contract on the basis of "fair dealing." On the question of integrity, the U.S. Copyright Act already prevents anyone from making a derivative work without the author's consent. "Derivative work" includes a whole range of adaptations of an original, including editorial revisions. If these can be legally proven to amount to "mutilation," the artist can sue. There are also laws of defamation to protect a travesty of an artist's reputation.

Still, there is no general moral rights protection in American law, and many of the protections implicit in current law do not have a strong record of being upheld. Most of the cases in which they have been supported have dealt with performers', rather than authors', rights. (The central case protected the right of a film actor to be properly identified.) Seven states have already passed moral rights laws to clear the matter up. Realistically, most artists don't have the clout of Woody Allen, and can't both protect their creative interests and earn a living.

We believe that artists should be granted greater control over their work and how it can be used. That does not mean we support a sweeping moral rights provision for any sale of any art. By throwing a time-consuming and expensive artist's veto into sales, it could seriously depress the market for film, fine arts, and literature, to the detriment of artists and public alike. A bill sponsored by Senator Ted Kennedy would force owners to give artists—or, worse, their quarrelsome estates—a cut in all future sales, playing bureaucratic havoc with the art market. It would throw into chaos not only the rights of owners, but also the rights of artists to bargain away their work for a price the market will pay. That's a right Spielberg and others have been all too happy to exercise for massive—and legitimate—financial gain. They should be allowed to keep it.

A blanket provision would also place intolerable demands on editors, marketers, and reproducers of art, who, under pressure of deadlines or particular markets, need to act swiftly or lose business. And it also too easily confers authorship of certain art forms on a single individual. Editors have been known, on occasion, actually to improve an article. For that matter, why should the director have sole control over a film? Why not the author of a book adapted to the screen? Or the producer?

The truth is that the legal principles for greater artists' control over their work are already implicit in American law. They need only be more regularly and rigorously brought out by juries and courts. The Supreme Court recognized in its 1985 ruling in *Harper & Row v. The Nation* that "the author's control of first public distribution implicates his personal interest in creative control" as well as his economic interest.

Artistic contracts can be modified in a way that recognizes the interests of all the parties involved: artist, owner, and public. For example, sales of fine art could be made with a legal stipulation that the owner commit himself not to damage or mutilate the work of art in any way, while retaining all other rights over it. That safeguards artistic concerns without laying waste to an art market that benefits artists and owners alike.

Art—especially public art—is not the sole preserve of the artist. It is something bought, interpreted, marketed, and given meaning by society as a whole. No one within that process deserves a sweeping veto on what happens to it, or even what it means, including the artist himself. The free market has operated in the art world without apparent cultural disaster for several centuries now largely because it recognizes that fact. So should the creator of the wookie.

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[From the L.A. Times, March 14, 1988]

Copyright Fight Resumes in Congress

By MICHAEL CIEPLY,
Times Staff Writer

With a bold legislative stroke, Congress could rectify decades of abuse by guaranteeing American artists the right to protect a work from defacement even after it is sold.

Or maybe such legislation would only clog the courts with lawsuits, and make doing business in such collaborative arts as movie making and magazine publishing extremely difficult.

These issues will come before the public Tuesday as prominent film stars and directors begin a new round of lobbying in Washington for a "moral rights" law to protect artists. Congress has been considering such a law in connection with several House and Senate bills designed to bring U.S. law into conformity with the Berne Copyright Convention.

The international convention, originally signed in 1886, is an agreement among 76 countries to enforce uniform copyright laws on a mutual basis. Thus, a work copyrighted in one "Berne" country is, in effect, copyrighted in all.

Among major world powers, the United States, China and the Soviet Union haven't signed the Berne convention. The United States does subscribe to the Universal Copyright Convention, which is more limited in scope.

But some 20 Berne countries aren't covered by the Universal Convention. And U.S. movie-makers, in particular, have argued that such pockets of video piracy as Thailand, Egypt, South Korea could be cleaned up, contributing perhaps $500 million a year more to American entertainment companies, if the United States belonged to Berne.

There is a catch, however.

The Berne convention requires that member countries extend "moral rights" to artists of all kinds. In the language of the treaty, an artist "shall have the right to claim authorship of the work and to object to any derogatory action in relation to the said work which would be prejudicial to his honor or reputation."

Some American artists—led by the Directors Guild of America, and such film makers as George Lucas and Steven Spielberg—have argued that the United States should adopt such rights. They particularly hope that movie directors and others could use newly legislated moral rights to stop the colorization of black-and-white films, or the cropping of movies for TV.

Publishers and movie makers, while some endorse adherence to Berne, have argued that U.S. law gives artists enough protection to comply with the convention, and that new rights for writers, visual artists or movie directors could unleash chaos in their industries.

At issue is whether the United States should legislate "moral rights" that would allow artists to sue if the integrity of their works is violated after sale.

Pro

For some artists, the issue is black and white—and goes to the very heart of civilization. "People who alter or destroy works of art and our cultural heritage for profit . . . are barbarians," George Lucas recently told Congress in an address that advocated moral rights and specifically condemned the movie colorisers.

Lucas and others argue that U.S. law extends almost no protection to a writer, director or visual artist once he sells his work.

Thus, a building owner who commissions a sculpture can legally hire another artist to alter the work, unless some local law happens to prohibit the change. "Does it follow that the Pope can repaint the Sistine Chapel?" movie writer Frank Pierson asked in congressional testimony.

The pro-moral rights camp contends that some fairly simple changes to U.S. law would bring the country into line with the more enlightened policies of France and Italy, where artists have standing to oppose such changes in court.

Proponents say French laws, which are relatively strict in this area, haven't created unmanageable litigation.

But much of the argument has focused on the trimming of films for TV, and the electronic coloring of movie classics such as "The Maltese Falcon," directed by John Huston.

Various directors, writers and actors have contended that a moral rights clause would let them protect our film heritage by preventing such changes, even though a movie studio might own copyrights to the film. They say that any director or writer who wished could freely agree to have a film colorized. But those who opposed such a step would have the power of law behind them.

In order to divorce their cause from any profit motive, directors have asked that moral rights legislation specifically prohibit an artist from selling his rights for more than $1. Thus, a director couldn't insist on an exorbitant fee to permit one of his old movies to be colorized.

Con

What if headstrong staff writers or movie directors used their "moral rights" to prevent unwanted editing of work just as Time magazine was going to press, or as Paramount Pictures was about to release a film?

The resulting chaos, according to representatives of big companies, including Time and Paramount, could bring movie production and magazine publishing to a halt.

Moral rights proponents say the problem could be dealt with by legislating that rights would begin only on the publication or release date. But the companies remain extremely leery of changes that would hamper their ability to change, display, adapt or market stories and films.

Testifying before Congress, veteran movie producer David Brown contended that existing law had "evolved to the point that there is no need" for new rights in order to comply with Berne. It is already illegal, for instance, to alter a film without clearly identifying the fact that it has been changed—in theory, protecting the creators against unfair reflections on their skills.

Some anti-moral rights forces particularly rankle at movie directors' claims that colorizing films constitutes defacement. They point out the original films aren't touched at all. Computers merely create a new and colored version.

They also hit the seeming arrogance of directors, who would call themselves the "artists" who created a film, when in fact any movie is made by dozens of people—and not least of all by the company that finances it.

In the words of Roger Mayer, a longtime MGM executive who now works with Turner Broadcasting: "Despite propaganda to the contrary, these old movies are not the 'violated children' of the director. They are, for the most part, the 'children' of the old movie moguls."

And, besides, Mayer told Congress, directors change other artists' work all the time. John Huston's "Annie" was criticized as an overblown version of the Broadway play, and Steven Spielberg's "The Color Purple" "changed, lightened and softened" the Alice Walker novel on which it was based, the executive said.

Resources

The artists' greatest resource is probably the drawing power of famous movie makers, many of whom have worked the publicity circuit and testified vociferously in favor of moral rights.

The list of endorsements includes Lucas, Spielberg, Milos Forman, Arthur Hiller, Ginger Rogers, Woody Allen, Warren Beatty, Jimmy Stewart, Sydney Pollack, Jerry Lewis and many more.

The Directors Guild, according to its own written summary of the moral rights issue, intends to "invite a substantial number of prominent directors, writers and actors to go to Washington to inundate Congress on March 15 and 16—just about the time all the legislative activities will be coming to a head."

On the other side, however, the movie companies and publishers can count on their substantial political clout.

Some publishers, including Dow Jones, Conde Nast, McGraw Hill, Playboy and Newsweek, have gone on record opposing the Berne adherence altogether, largely out of fear that moral rights would disrupt business.

The Motion Picture Assn. of America, a lobbying group, has joined software publisher IBM and others in advocating adherence to Berne, but without any new moral rights legislation.

Prospects

The tide appears to be running against the artists at the moment, although a powerful lobbying push could reverse congressional thinking.

A key Berne-adherence bill sponsored by Rep. Robert Kastenmeier (D-Wis.), who chairs a House subcommittee that oversees copyright matters, is being sent to the full judiciary committee without a moral rights clause. That reduces, but doesn't eliminate, the possibility that directors and other artists will get what they want as part of the Berne bill.

But one Directors Guild representative says the union will keep pushing for moral rights legislation even if it isn't ultimately included in a Berne bill, and that further congressional action is expected soon.

RESPONSES OF RICHARD S. RUDICK ON BEHALF OF ANDREW H. NEILLY TO QUESTIONS RAISED BY COMMITTEE MEMBERS

QUESTIONS OF SENATOR HEFLIN

3. Mr. Neilly, in your testimony you state that some estimate that by the turn of the century there will be more people who use the English language in work or education in China than in the United States. I agree with you that this represents a considerable market opportunity for American publishers, especially if they can substantially reduce the number of pirated books sold in that country.

> Are the pirated books actually reproduced in China, or are they imported into the country from other countries?
>
> If you are unable to identify the offending countries and stop the flow of books into a country, are there any provisions in the Berne Convention that would enable you to take action against the proprietors of a particular country who import and sell the books?

ANSWER TO QUESTION 3, PANEL I

My understanding is that all or nearly all of the unauthorized books of U.S. publishers sold in the People's Republic of China are printed in that country.

If we are unable to stop the flow of pirated books into a country, we would have whatever remedies against booksellers or importers of pirated editions are provided under the laws of that country. The minimum standards of Berne require its members to provide effective levels of protection, which should substantially help to stem piracy in member countries. As I and others have stated, U.S. adherence to Berne is necessary to support efforts by our trade representatives and others to persuade the countries in which "pirate" publishers operate to adopt the high level copyright standards set by Berne and extend that protection to U.S. and other foreign publishers.

4. Mr. Neilly, in your discussion of moral rights you state that your relationship with authors of your subsidiaries in England, Canada and Australia are not more difficult than in the United States. You point out that these countries are all members of Berne and have copyright systems similar to ours.

> That being the case, what harm would there be in adopting the moral rights provision of Berne?

ANSWER TO QUESTION 4

The United States, in the view of nearly all copyright experts including the Director General of WIPO, which administers Berne, already provides protection which satisfies the moral rights provision (Article 6 bis) of Berne--so there should be no harm. As a publisher I would caution against expanding or altering laws which affect satisfactory existing practices, or would alter the current balance of interests between authors and publishers without careful study. However, all of the bills before you preserve that balance, and as a publisher I do not want to see important economic and foreign trade benefits for both publishers and authors delayed over issues which can be dealt with separately, if they need to be dealt with at all.

ANSWER TO QUESTION FROM SENATOR DE CONCINI, DURING TESTIMONY REGARDING SPECIFIC EXAMPLES OF HOW ABSENCE FROM BERNE HAS HURT OUR BUSINESS

Q. -WE HAVE HAD MANY WITNESSES TESTIFY IN GENERAL TERMS ON HOW U.S. MEMBERSHIP IN BERNE WOULD HELP TO PREVENT PIRACY OF U.S WORKS AND STRENGTHEN OUR NEGOTIATING POSITION AT THE GATT MEETINGS. I WONDER IF, AS A PUBLISHER, YOU COULD OFFER SOME SPECIFIC EXAMPLES OF HOW OUR ABSENCE FROM BERNE HAS HURT YOUR BUSINESS AND HOW OUR MEMBERSHIP IN BERNE WOULD HELP YOU.

PERHAPS YOU COULD DO THIS BY TELLING US MORE ABOUT YOUR PROBLEMS WITH PIRATED WORKS IN KOREA THAT YOU MENTIONED IN YOUR TESTIMONY.

A. The pirated editions of 350 titles of our company alone in one country alone and in a single catalog is only an example of the lost opportunities for U.S. publishers in many countries on a continuing basis. The February 1988 report of the U.S. International Trade Commission to the U.S. Trade Representative on Foreign Protection of Intellectual Property Rights indicates the specific countries, specific problem areas, and the estimated economic effects of piracy, which membership in Berne will help to address.

Senator DECONCINI. Thank you, Senator Heflin.

Thank you, gentlemen. We appreciate your testimony very much.

We are just initiating a vote here. We will move to the next panel and ask them to come up: Mr. Ladd, Mr. Kummerfeld, and Mr. Carter. If they would be seated, I will return in about 7 or 8 minutes and we will take up their testimony.

[A short recess was taken.]

Senator DECONCINI. The subcommittee will be in order.

We are going to go to the second panel now and we will hear from Mr. Carter first.

Mr. Carter, your full statement will appear in the record. If you would summarize in 5 minutes, we would greatly appreciate it.

STATEMENT OF JOHN MACK CARTER ON BEHALF OF THE AMERICAN SOCIETY OF MAGAZINE EDITORS

Mr. CARTER. Thank you, Mr. Chairman, members of the subcommittee. With that understanding, I will do exactly that, presenting a summary.

My name is John Mack Carter. I am submitting this statement on behalf of the American Society of Magazine Editors, known as ASME. ASME is the professional society for senior editors of consumer magazines, business papers, and foreign publications. We have 600 members who are chief editors, managing editors, and art directors.

My message today is simply this: American magazines and their editors should be protected from the Berne Convention's so-called moral rights provisions. The American magazine industry as it functions today simply cannot comply with the moral rights provisions contained in that convention. These provisions are foreign to American publishing concepts, infringing on editors' freedom, making costly publishing delays inevitable, and possibly even creating a basis for injunctions to stop publication.

Obviously I am not a lawyer, nor an expert on copyright or international trade, but I am an expert on editing magazines, and I believe that adoption of moral rights would radically alter the way American magazines have been edited for over 200 years. The potential ramifications are enormous.

The editor is responsible for seeing that each issue is published on time. Moral rights would drastically curtail the editor's freedom of action and judgment, making the meeting of this responsibility enormously difficult, if not impossible.

The editor has no choice. All materials must be ready for press time. The closing of an issue requires that these materials be fit, that some articles be cut in length or some language be added. It is the practice and custom of the American consumer magazine industry that authors are not given approval over the final editing of articles.

Authors and the magazine industry are aware that such editing takes place. It would be an unfair burden on editors and on the industry to place at risk an issue of a magazine or to risk being thrust into legislation and litigation because editing changes made in an article were not approved by an author.

The process and problems with respect to photographs are similar. In the magazine industry, photographers are not given approval over how their photographs may be cropped or where they will appear in the magazine. It is impossible to allow all authors and all photographers to see final versions of their articles and photographs for approval prior to scheduled publication, yet we are advised that moral rights would require editors to do so or risk litigation.

I leave it to you and to the experts to argue about whether we can be protected in the legislation you are considering. Mr. Ladd will be addressing that issue in a few moments, but I can tell you unless we are protected, American magazines are going to change, and not for the better.

The position I am advancing today is the same as that of the Hearst Corp., my employer, whose interests also include newspapers, newspaper feature syndicates, book publishing, cable television, and radio. Mr. Chairman, thank you.

[The prepared statement of Mr. Carter follows:]

STATEMENT OF JOHN MACK CARTER
ON BEHALF OF THE
AMERICAN SOCIETY OF MAGAZINE EDITORS

MARCH 3, 1988

SUMMARY

Unless American magazines and their editors can be protected from the Berne Convention's "moral rights" provisions, ASME opposes United States adherence to that Convention. The American magazine industry as we know it today simply cannot comply with the moral rights provisions of Berne. Those provisions are foreign to American concepts: infringing on editors' freedom, making costly publishing delays inevitable, and possibly even creating a basis for injunctions to stop publication.

I am not a lawyer, nor an expert on copyright or on international trade. But I am an expert on editing a magazine, and I guarantee that adoption of "moral rights" would radically alter the way American magazines have been edited for over 200 years. The ramifications are enormous.

The editor is responsible for seeing that each issue is published on time. "Moral rights" would drastically curtail the editor's freedom of action and judgment, making the meeting of this responsibility enormously difficult, if not impossible. Delays means huge losses for the magazine and its advertisers.

The editor has no choice; all materials must be ready for press time. The "closing" of an issue requires that these materials be fitted, that some articles be cut in length, or some language be added. It is the practice and custom of the American consumer magazine industry that authors are not given approval over the final editing of articles. Authors and the magazine industry are aware that such editing takes place. It would be an unfair burden on editors and on the magazine industry to place at risk an issue of a magazine -- or to risk being thrust into litigation -- because editing changes made in an article were not approved by an author. The process and problems with respect to photographs are similar. In the magazine industry, photographers are not given approval over how their photographs may be cropped or where they will appear in the magazine. It is impossible to allow all authors and photographers to see final versions of their articles and photographs for approval prior to scheduled publication. Yet, "moral rights" would require editors to do so, or risk litigation.

I leave it to you and to the "experts" to argue about whether we can be protected in the legislation you are considering. But I tell you in all sincerity: unless we are protected, American magazines are going to change -- and not for the better.

* * *

Mr. Chairman and Members of the Subcommittee:

My name is John Mack Carter. I am submitting this statement on behalf of the American Society of Magazine Editors, an affiliate of the Magazine Publishers of America (MPA).

The American Society of Magazine Editors, known as ASME, is the professional society for senior editors of consumer magazines, business papers and farm publications. Our 600 members are chief editors, managing and executive editors, and senior editors and art directors nominated by the chief editor.

I am the editor-in-chief of Good Housekeeping and have been since 1975. I am also the director of New Magazine Development for The Hearst Corporation, the owners of Good Housekeeping, as well as the host of the cable television program "Good Housekeeping's A Better Way". Prior to joining Hearst I was the editor of Ladies' Home Journal and McCall's. I was also the editor of American Home and American Home Crafts and the assistant editor of Better Homes and Gardens.

I received the University of Missouri Honor Award for Distinguished Service in Journalism in 1970, and am a member of Sigma Delta Chi, the professional journalism society. In 1977, I was named "Publisher of the Year" by Brandeis University, and in 1978, national "Headliner of the Year" by Women in Communications, Inc.

In September of 1987, on behalf of MPA, I testified in the House of Representatives on the subject of the Berne Convention and "moral rights".

I will say now what I said then: the American magazine industry as we know it today simply cannot comply with the moral rights provisions of Berne. I am not a lawyer. Nor do I claim to be an expert on copyright or on international trade. But I am an expert on editing a magazine and preparing it for publication. I hope this morning to give the subcommittee an idea of the very real problems which Berne adherence and "moral rights" would present for American magazines and their editors.

I leave it to you and to the "experts" to argue about whether we can be protected in the legislation you are considering. But I tell you this in all sincerity: unless we are protected, American magazines are going to change -- and not for the better.

Aside from the apparent legal problems of injunctions, damages, and the like -- with every magazine being published under a permanent cloud of potential litigation -- adoption of "moral rights" would radically and permanently alter the way in which American magazines have been edited for over 200 years. The ramifications are enormous.

The editor of every magazine published in the U.S. is faced with the ultimate responsibility of seeing to it that each issue of that magazine is published on time. In order to understand how expensive a delay of even one day can be at a critical juncture, the scheduling of an issue must be examined.

We begin with the goal of the editor, the on-sale date of the issue. This is the date not only when the new issue is placed on display at newsstands for purchase, it is also the date when the prior issue goes off-sale. The effect of missing an on-sale date means that an older, stale issue will be competing against a new issue from rival magazine publishers and thus be at a disadvantage. Additionally, sales information and dated coupons contained in the issue will not reach the reader when expected. A delay of a day can mean hundreds of thousands of dollars of lost revenue; a delay of several days can result in the loss of millions of revenue dollars. But aside from the loss of sales of the issue, the magazine might lose the confidence of its advertisers and future advertising revenue. The advertisers themselves could lose sales opportunities because of a late appearing advertisement. In an extreme case the loss of an issue, i.e., the inability to have it placed on sale, could conceivably force the magazine to close.

Much of the delivery system of magazines is out of the publisher's direct control. Newsstands are almost never owned by magazine publishers. Newsstands receive the bulk of their inventory by truck from local wholesalers, which similarly, are not owned by the magazine publishers. The local wholesalers schedule the delivery of magazines to conform to the scheduled on-sale date of the issue and to their truck capacity. A late arrival of an issue at the local wholesaler can result in a week's delay in the shipment of the new issue to the newsstands with the resultant loss of sales.

The delivery to the local wholesalers is in most cases done by national distributors, some of which are owned by large magazine publishers. However, here too delays caused by not having the magazines ready to be shipped at the bindery can cause further delays in shipments to the local wholesalers since contracted space on rail or other freight conveyances may not be available.

The printing plant and the bindery where the magazine is to be produced require huge capital investments and are therefore not typically owned by the magazine publisher. Those capital costs make it vital that the printer completely fill its press time schedule as fully and as far in advance as possible.

A large circulation magazine may be scheduled for a press run of ten or eleven days. If the printer knew how long the delay would be in a particular situation, it might be possible to reschedule the press time of a small print job, providing the materials necessary were at hand. However, the printer cannot keep its presses idle, nor can it interfere with the press run of its other customers if their materials arrive on time. Thus, if an issue has missed its press date, it may be scheduled up to two weeks late with resultant delays throughout the distribution process. An issue that has missed its press date is in real trouble; if it is printed at all there will be enormous overtime expenses.

The editor has no choice; all of the materials for an issue must be ready for press time. The final process for putting together an issue of a magazine, called the closing of an issue, can take a few days, is invariably less than a week, and must be completed by the press date. It is during the process of closing an issue that final editing, cutting, and fitting of all articles is done, as well as the final review of all cover lines (the material which is to appear on the cover of the magazine). The assembly of text, graphics, and illustrations in what is often a complex design requires that some articles have to be cut from several words to several lines, or some additional language may have to be added in order to fill unsightly gaps.

It is the practice and custom of the American consumer magazine industry that authors are not given approval over the final editing of articles. The reason is clear: there is simply no time to go back and get approvals. During the closing of an issue, editors try to make only cosmetic changes which will not change the sense of an article, but time is of the essence and authors as well as publishers are aware of the problems of closing an issue.

An editor of a major consumer monthly may plan an issue of which 75% of the text and up to 100% of the photographs will originate from free lancers. It is imperative that such articles be commissioned far enough in advance so that they can be reviewed by the editors and sent back with corrections or guidance so that the author can make necessary changes or support positions they have taken. Indeed, major stories of 5,000 to 10,000 words may be commissioned eight months in advance of the cover date. Holiday material may be commissioned one year in advance.

While the basic premise at most magazine publishers is that the writer is expected to do the writing with guidance from the editors, occasionally a problem will develop where an article is not sent to an author for the author's correction. This can occur when an article originally scheduled for a particular issue must be dropped because intervening events have rendered the article unusable and a substitute article must be commissioned on short notice. Or, an article may be turned in which the editor believes does not fit in with the particular viewpoint the article was expected to express or does not come up to the standards of the magazine, in which event a substitute article may be commissioned. Occasionally an article will be revised by an author and the revisions may not have corrected the problem the editor originally saw. In these situations, as well as in those instances where an author is unavailable to make corrections, editing may occur which is of more than a cosmetic nature. Authors and the magazine industry are aware that such editing takes place. It would be an unfair burden on the magazine industry to place at risk an issue of a magazine -- or to risk being thrust into litigation -- because editing changes made in an article were not approved by an author.

The process with respect to photographs is similar. In the magazine industry, photographers are not given approval over how their photographs may be cropped or where they will appear in the magazine. Here again it is not practical to consult with photographers to get their final approval over how photographs will look in the magazine.

In short, American consumer magazines, in order to survive, face a constant series of deadlines during which time the different components of an issue must not only be assembled but also shaped into their final form. It would be impossible to allow all authors and photographers to see final versions of their articles and photographs for approval prior to scheduled publication.

I don't know what benefits others may see in Berne, but I do know that the introduction of the "moral rights" doctrine would fundamentally, permanently, and adversely alter the face of American magazines. Unless we editors can be protected from the dangers of moral rights, ASME respectfully opposes adherence to the Berne Convention.

On behalf of the 600 members of ASME, I thank you for considering our views.

Senator DECONCINI. Thank you, Mr. Carter.
Mr. Kummerfeld.

STATEMENT OF DONALD F. KUMMERFELD, PRESIDENT, MAGAZINE PUBLISHERS OF AMERICA

Mr. KUMMERFELD. My name is Donald Kummerfeld. I am president of the Magazine Publishers of America. MPA, as it is known in the industry, is an organization representing the interests of more than 200 publishing companies which publish consumer-oriented periodicals. Newsweek, Better Homes and Gardens, Reader's Digest, Good Housekeeping, and Sports Illustrated are among the more widely circulated magazines in our group, but hundreds of other periodicals appealing to a wide variety of interests and avocations are also MPA members. Harper's, Foreign Affairs, Bon Appetit, Essence, Fly Fisherman, Scientific American, Colonial Homes, The New Yorker, and even Arizona Monthly are among MPA's more than 800 member magazines. Circulation of member magazines is now almost 300 million copies per issue.

Now I understand there are a couple of impoverished authors from Hollywood waiting in the wings, so I will be brief and blunt.

The merits of the Berne Convention and the meaning of so-called moral rights no longer are just esoteric debating points or grist for the academic mill. For the industry I represent, the prospect of U.S. adherence to the Berne Convention is a deadly serious and frighteningly real issue.

On behalf of the American magazine industry, I first wish to comment on the administration's testimony here last week.

Ambassador Yeutter understandably takes the global view of Berne adherence. He may be right when he says U.S. adherence will give him added leverage in negotiations with other nations. I recognize that some of our colleagues in U.S. industry feel strongly that their international interests would be served by Berne adherence, but when the Ambassador and others say in so many words, "Let's adhere now and worry about the details later," I must object.

American magazines have to worry about the details now. Publishers and editors of American magazines don't have the luxury of being able to take the global perspective or academic viewpoint. We are the ones who would have to work under the shadow of so-called moral rights every day of our professional lives. With all due respect, we would be at risk, not Ambassador Yeutter or Secretary Verity.

Let me now state our industry's position on Berne adherence. We do not oppose adherence, so long as adherence does not disrupt the delicate balance of rights which presently exists under the American copyright law and within our industry.

We have a system that works. It is a system that has served publishers, editors, authors and creators and, most importantly, the American reading public, extremely well for two centuries. The introduction of the Berne concept of so-called moral rights in to American law would upset the balance and radically alter the system which has been forged over the course of 200 years of our history, beginning with the framers of the Constitution itself.

Those who would disrupt this balance and alter this system bear an extraordinarily heavy burden of proof.

I understand and respect the pro-Berne arguments of companies and industries such as those represented on the previous panel. We, too, believe there may be some benefits for our companies in Berne adherence, such as increased piracy protection, although we note that several of the biggest pirates in the world belong to Berne. But adherence without adequate protection against so-called moral rights is, for us, too high a price to pay.

With regard to the previous panel, I appreciate that although the magazine industry itself is united on the issue of Berne, there is an honest divergence of opinion within the family of book publishers and software manufacturers. I should point out that three of MPA's larger members—Time Inc., Hearst, and McGraw-Hill—are also three of the largest book publishers in the world. In addition, McGraw-Hill is a major producer of software and has chronic overseas piracy problems, yet all three of these companies have grave reservations about Berne adherence, because of so-called moral rights, and strongly support our position.

Mr. Chairman and members of the subcommittee, we recognize there are legitimate American interests, public and private, which would be served by Berne adherence, but we cannot allow our legal system and our industry to be sacrificed in the process. We believe that your legislation can be crafted in a way which would permit adherence while preserving our time-honored system and protecting our industry, and we believe the Hatch amendment does that, and we support it. Mr. Ladd, the next speaker, will explain in detail what is required.

What we have in this Nation is unique and worth keeping. Let's adhere to Berne, but only if we can preserve the balance of rights which has served us so well for so long.

Thank you.

[The prepared statement of Mr. Kummerfeld follows:]

STATEMENT OF DONALD D. KUMMERFELD
ON BEHALF OF THE
MAGAZINE PUBLISHERS OF AMERICA

BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

Mr. Chairman and Members of the Subcommittee:

My name is Donald D. Kummerfeld. I am President of the Magazine Publishers of America.

MPA is an organization representing the interests of more than 200 publishing firms which publish consumer-oriented periodicals. Newsweek, Better Homes and Gardens, Reader's Digest, and Good Housekeeping are among the more widely circulated magazines, but hundreds of other periodicals appealing to a wide variety of interests and avocations are MPA members. Harper's, Foreign Affairs, Bon Appetit, Essence, Fly Fisherman, Scientific American, Colonial Homes, The New Yorker, and Arizona Monthly are among MPA's over 800 member magazines. Circulation of member magazines now exceeds 290 million copies per issue.

Mr. Spielberg and Mr. Lucas are waiting in the wings, so I will be brief -- and blunt.

The merits of the Berne Convention and the meaning of so-called "moral rights" no longer are just esoteric debating points or grist for the academic mill. For the industry I represent, the prospect of U.S. adherence to the Berne Convention is a deadly serious and frighteningly real issue.

On behalf of the American magazine industry, I first wish to comment on the Administration's testimony here last week.

Ambassador Yeutter understandably takes the "global" view of Berne adherence. He may be right when he says U.S. adherence will give him added leverage in negotiations with other nations. I recognize that some of our colleagues in U.S. industry feel strongly that their international interests would be served by Berne adherence. But when the Ambassador and others say, in so many words, "Let's adhere now, and worry about the details later", I must object.

American magazines have to worry about the "details" now. Publishers and editors of American magazines don't have the luxury of being able to take the "global" perspective or "academic" viewpoint. We are the ones who would have to work under the shadow of "moral rights" every day of our professional lives. With all due respect, we would be at risk -- not Ambassador Yeutter or Secretary Verity.

Let me now state our industry's position on Berne adherence.

We do not oppose adherence -- so long as adherence does not disrupt the balance of rights which presently exists under American copyright law and within our industry.

We have a system that works. It is a system that has served publishers, editors, creators -- and, most importantly, the American reading public -- extremely well for two centuries.

The introduction of the Berne concept of so-called "moral rights" into American law would upset the balance and radically alter the system which has been forged over the course of 200 years of our history, beginning with the framing of the Constitution itself. Those who would disrupt this balance and alter this system bear an extraordinarily heavy burden of proof.

I understand and respect the pro-Berne arguments of companies and industries such as those represented on the previous panel. We, too, believe there may be some benefits for our companies in Berne adherence, such as increased piracy protection. But adherence without adequate protection against "moral rights" is too high a price to pay.

With regard to the previous panel, I appreciate that, although the magazine industry is united on the issue of Berne, there is an honest divergence of opinion within the family of book publishers and software manufacturers. I should point out that three of MPA's larger members -- Time Inc., Hearst, and McGraw-Hill -- are also three of the larger book publishers in the world. In addition, McGraw-Hill is a major producer of software and has chronic overseas piracy problems. Yet, all three of these companies have grave reservations about Berne adherence -- because of "moral rights".

Mr. Chairman and Members of the Subcommittee, we recognize that there are legitimate American interests -- public and private -- which would be served by Berne adherence. But we cannot allow our legal system and our industry to be sacrificed in the process.

We believe that your legislation can be crafted in a way which would permit adherence while preserving our time-honored system and protecting our industry. Mr. Ladd will explain what is required.

What we have in this nation is unique -- and worth keeping. Let's adhere to Berne, but only if we can preserve the balance of rights which has served us all so well for so long.

Senator DECONCINI. Thank you.
Mr. Ladd.

STATEMENT OF DAVID LADD ON BEHALF OF THE COALITION TO PRESERVE THE AMERICAN COPYRIGHT TRADITION

Mr. LADD. Thank you, Mr. Chairman.

Mr. Chairman, Senator Leahy, I appear here today for the Coalition to Preserve the American Copyright Tradition. The members of the coalition are given in the prepared statement and, as Mr. Kummerfeld pointed out, it includes not only magazine publishers but companies with very large book publishing——

Senator DECONCINI. Mr. Ladd, would you pull that microphone a little closer to you?

Mr. LADD. Yes, of course—and telecommunications operations as well.

In the House hearing on this issue, the coalition presented an annotated 45-page statement of its position, and here to this subcommittee we have presented an abbreviated statement based on that in the House, with the request that the fuller statement be included in the record here also. We ask this because in recent days, as has appeared already in the testimony this morning, a proposal for an amendment affecting the moral rights issue has emerged and has been introduced in the Senate by Senator Hatch as an amendment to his bill, S. 1791.

Senator DECONCINI. Without objection, we will include that in the record.

Mr. LADD. Thank you, Mr. Chairman.

The proposal in Senator Hatch's bill would go far to ease the coalition's concerns about the moral rights issue, which has been the central reason for the coalition's opposition to adherence. Consequently, the longer statement will allow the subcommittee to understand the coalition's full position, and permit us here to turn our attention to the possibility of accommodation and compromise represented by the Hatch amendment.

We are, of course, grateful to Senator Hatch for his initiative, and to the other members of the subcommittee as well for their consideration of our views. We are hopeful that the Hatch amendment will open the door to compromise without delaying consideration of the Berne implementation bills. No one, of course, disputes the need to improve the world order for the protection of intellectual property. As a matter of fact, it has been a great and growing concern in the Congress now for a number of years.

Likewise, the coalition understands and respects the achievements and value of the Berne Convention. The coalition also appreciates the strong sentiment for adherence which has arisen and which has been expressed here again this morning by the first panel.

The coalition's primary concern is the possible introduction into our law of moral rights as defined and applied in numerous Berne signatory countries, with its predictable effect, to which the previous witnesses on this panel have testified, upon their life and work. These effects are explored in our prepared statement and in more detail in the House statement. In sum, the introduction of moral rights in whatever form would impose new liabilities of unknown dimensions upon the copyright industries and engender much litigation.

The Congress has considered two responses to this moral rights controversy: the first, an explicit statutory provision for limited moral rights, which appeared in one of the bills considered in the House; and, the second, reliance upon present analogues to moral rights in State and Federal law as adequate to satisfy Berne's requirement, omitting any specific treatment of the moral rights—what has been referred to here again this morning as the "minimalist" approach.

Congress seems to have narrowed its consideration of the moral rights issue to the minimalist approach, which characterizes the bills now before this subcommittee. Accordingly, we now turn our attention to the Hatch amendment and how it, moving on the premise of the minimalist view, responds to our concerns.

It is not enough, in the coalition's view, to provide that the Berne implementing legislation not be employed to expand the moral rights which would satisfy Berne. That would leave the States free, upon their own initiative and without reliance on the Berne Convention itself or on the U.S. Berne implementing legislation, to expand those rights.

Now from the testimony in the first panel and, I gather, from the tenor of what has been said here, there is general agreement on both sides that if the course or approach of this amendment is followed, the objective will be to maintain the status quo and law. That, as I understand it, is the purpose of the Hatch amendment. It is certainly our purpose in supporting the Hatch amendment, and I want to explain why the enactment of the bills which are now before the subcommittee do not specifically reach out and freeze State law do not meet our concerns.

The adoption of Berne implementing legislation will, at a minimum, effect a change. It will be the first time there has been an acknowledgment, either directly or by implication, that there is a body of law, whether State or Federal, that is the equivalent of moral rights. Until now, courts have uniformly rejected the idea that moral rights is part of our law.

Now we quite agree that it is very likely that the moral rights issue will arise in the future, whether we adhere to Berne or not. I don't think that can be avoided. I think the debate is likely to be protracted, and that the gestation period for any legislation which may come out of it will be very long.

But the point is, we want the legislation to provide, as a part of the compromise, that not only would the statute not be self-executing, but also that the implementing statute adopted by Congress may not be relied upon to expand or contract moral rights. Under the amendment, State and Federal law also may not be expanded during that interval. That is the purpose, as I understand it, of the Hatch amendment, and that certainly is our purpose in supporting it.

Senator Hatch remarked in introducing his amendment that the proposal should open a constructive discussion of this important subject, and discussion will certainly be required. The invocation of the preemption power would raise subtle legal questions in this case. Some of those have arisen in discussions within the last few days with Members of Congress and their staffs, but a properly crafted preemptive freeze would go far to ease the coalition's opposition to Berne. By the way, the Copyright Act has employed freeze provisions in the past, but I think that they are of limited application to the problem which is before us.

Actually I have more but I think that I have covered the main points that I wanted to cover in my opening statement, and I know you are short of time, Mr. Chairman.

[Statements of Mr. Ladd follow:]

Statement

of

David Ladd

on behalf of

The Coalition To Preserve the American Copyright Tradition

Conde Nast Publications, Inc.
Davis Publications, Inc.
Dow Jones & Company, Inc.
Forbes Inc.
McGraw-Hill, Inc.
Meredith Corp.
Newsweek, Inc.
Omni Publications International, Ltd.
Playboy Enterprises Inc.
The Reader's Digest Association, Inc.
Rodale Press, Inc.
Straight Arrow Publishers, Inc.
Time Inc.
Triangle Publications, Inc.
Turner Broadcasting System Inc.
U.S. News & World Report

Before

The Subcommittee on Patents, Copyrights, and Trademarks

Committee on the Judiciary

United States Senate

March 3, 1988

©PACT

Coalition to Preserve the American Copyright Tradition

Summary

CPACT, which comprises sixteen major media organizations with large domestic and international magazine, publishing, broadcasting, video programming and other businesses, is committed to the overall objective of expanding the level of copyright protection worldwide. CPACT does not believe, however, the U.S. adherence to the Berne Convention is necessary for this objective.

CPACT further believes that U.S. adherence to Berne presents a grave risk of fundamental change in our American copyright system -- the introduction of the concept of "droit moral" (the "moral right") into U.S. law. Its introduction would disturb the historical balance among authors, publishers, and the public and upset decades of settled practices, contract conventions, expectations, and risk allocations. For example, the moral right would:

- raise serious questions of author identification in collaborative works such as magazines, textbooks and broadcasts;
- permit second-guessing of split second editorial decisions that are necessary to time sensitive publications or productions;
- Cloud the status of adaptations and revisions;
- intrude on content judgments if creators objected to the context in which their work is placed;
- interfere with the editing of films for television; and
- apply retroactively to existing works, thereby jeopardizing settled expectations and investments.

These and other problems inescapably would lead to frequent and expensive litigation. Unless these risks can be avoided, the United States should not adhere to Berne.

The so-called "minimalist approach" to Berne adherence would remove the restraints on judicial legislation afforded in the past by judicial rejection of the moral right. It would also lead to further domestic and foreign pressure for expansion of these rights.

Senator Orrin G. Hatch has introduced an amendment for consideration which would freeze the state of American law relied on by supporters of the "minimalist approach" to satisfy U.S. moral right obligations under Berne as it exists on the date of adherence and preempt further expansion by statute or judicial construction. CPACT supports this proposal as a means of assuring that the delicate balance of rights between American authors and copyright owners remain undisturbed, and believes it to be a most constructive step towards resolving the Coalition's objections to U.S. adherence to Berne.

* * *

Mr. Chairman and Members of the Subcommittee, I appear today for the Coalition To Preserve the American Copyright Tradition to present its views on the proposed United States adherence to the Berne Convention.

The Coalition comprises the following members: Conde Nast Publications Inc.; Davis Publications, Inc.; Dow Jones & Company, Inc.; Forbes Inc.; McGraw-Hill, Inc.;

Meredith Corp.; Newsweek, Inc.; Omni Publications International, Ltd.; Playboy Enterprises Inc.; The Reader's Digest Association, Inc.; Rodale Press, Inc.; Straight Arrow Publishers, Inc.; Time Inc.; Triangle Publications, Inc.; Turner Broadcasting System Inc.; and U.S. News & World Report. These companies, some of our largest international book and magazine publishing companies, as well as major domestic media and programming organizations, are committed to the objectives of preserving, strengthening, and expanding the level of copyright protection worldwide. The Coalition believes, however, that U.S. adherence to Berne presents a grave risk of fundamental change in our American copyright system -- the introduction of the concept of droit moral into U.S. law. Unless this risk can be avoided, the United States should not adhere to Berne.

The Coalition has been working closely with Senator Orrin G. Hatch and his staff toward that end. Other members of the Subcommittee, including the Chairman and Senator Leahy have been kept apprised of these discussions. We appreciate their sensitive consideration of our concerns.

The Hatch Amendment would go far to ease the Coalition's concerns. It strengthens the congressional declarations and statement of intent to make absolutely clear that the copyright law does not provide the moral right, that U.S. obligations under Article 6 bis are satisfied by American law as it exists today, and that adherence to Berne is not to be used as a basis for expansion of doctrines relating to the moral right.

The Amendment also enacts, as positive law, a freeze of the present-law "equivalent" of the moral right, using the federal preemption power. Such a freeze would make clear to the world that the United States, in reliance on the representation of WIPO, has conditioned its adherence on the principle that no expansion of the moral right in the United States is necessary. To be sure, further efforts to enact the moral right may well not be avoided; but such a freeze would ensure full consideration of the issue on its own merits, free from pressures related to Berne adherence.

* * *

No one disputes the need to improve the world order for the protection of intellectual property. Nor does the Coalition's position bespeak a lack of appreciation or respect for the past achievements of the Berne Convention. However, this Subcommittee must assess how can Berne, in its present condition, serve the interests of the United States; and what effect adherence would have on authors and their publishers in our country. (By "publishers", we mean any entrepreneurs whose efforts lead to the public dissemination, performance, or display of works of authorship.)

Careful consideration of these issues is essential, because a decision to adhere to Berne is for all practical purposes irrevocable. Under Article XVII of the Universal Copyright Convention ("U.C.C."), the United States may not withdraw from the Berne Union without losing protection for U.S. works in all of the 76 member states of the Berne Union, including the 52 Berne states with which the United States currently has copyright relations under the U.C.C.

This Subcommittee already has heard arguments that to lead in the effort to elevate and extend copyright protection throughout the world, the U.S. can demonstrate its own commitment only by adhering to Berne, that its own domestic law is not an adequate exemplar for that purpose, and that adherence to Berne is a sine qua non in inducing other countries, especially pirate countries, to afford adequate protection. These contentions are contradicted by the outstanding international leadership of the United States in copyright in recent years -- in its domestic legislation, bilateral negotiations, the integration of trade and intellectual property issues, and above all the introduction of intellectual property issues into the present Uruguay round of negotiations in the General Agreement on Tariffs and Trade (GATT) -- and its notable success, without Berne. No other nation has provided such leadership nor attained such results.

Neither is adherence to Berne required to bear witness for U.S. dedication to copyright. The United States does, and long has, provided for its own citizens and eligible foreigners as well, a copyright system for which no apologies are necessary and pride is appropriate.

And, contrary to the claims of the proponents of adherence, Berne will not noticeably increase the level of protection afforded to U.S. works abroad. United States nationals enjoy Berne protection through the front door of national treatment in all our major trading partners by virtue of our common membership in the U.C.C. Moreover, through the simultaneous publication provisions of Berne, American nationals may also enjoy Berne level protection in those remaining Berne countries -- not one a major U.S. trading partner -- which are not members of the U.C.C.

Adherence to Berne also is not likely to curb the international piracy problem. Much piracy occurs in countries outside Berne. Nor is adherence a guarantee against piracy: a 1986 report to Congress by its Office of Technology Assessment identifies sixteen Berne members "which do not adequately protect intellectual property rights".

Proponents of adherence further argue that pirate nations have resisted U.S. calls for reform on the basis of our absence from Berne. Nations intent upon sheltering piracy will advance any argument of convenience to resist adequate protection, and this is among the most transparently disingenuous. What is relevant as an example is not Berne, but the high level of protection of our law, the depth and richness of our market, and the effectiveness of enforcement available to eligible foreigners as well as U.S. nationals. In the final analysis, the way to curb piracy is by making it clear that piracy does not pay. This message has and is being delivered by the U.S. through our denial of U.S. market access and trade assistance to nations that do not adequately protect U.S. intellectual property.

* * *

Adherence to Berne presents a grave risk of fundamental change in our American copyright system -- the introduction of the concept of droit moral into U.S. law. The effect of that change is too significant to ignore.

Droit moral, which is translated as the "moral right," comprises several specific authors' rights. At least some of these rights are expressly mandated by Article 6 _bis_ of the Berne Convention. That Article requires signatory states to recognize the right of authors "to claim authorship of the work [the "paternity right"] and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation [the "integrity right"]."

The incompatibility of _droit moral_ with the fundamental theory of U.S. copyright law, the potential impact upon the public and upon U.S. copyright industries, and the risk of opening the door to expansion and elaboration all militate against incorporation of _droit moral_ into U.S. law.

The Constitution grants power to Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The purpose of copyright in the U.S. is economic -- to provide an incentive to create and disseminate works of authorship, or in the Constitutional word, "writings." Despite numerous attempts to inject moral rights claims into U.S. copyright jurisprudence through litigation, the courts in the service of the Constitutional mandate have consistently rejected the moral right, focusing instead upon the allocation of economic rights and incentives.

The members of the Coalition are dedicated to the timely, effective and full dissemination of information and copyrighted works to the public, values at the center of the First Amendment. They have long structured their editorial and business operations on the understanding that the moral right is not a part of our law. The result has been a quality and style of publication unmatched throughout the world. The importation of _droit moral_ would impinge upon the ability of the publishing community to fulfill its crucial function.

In the examples which follow, keep in mind that editing for collective works such as newspapers and magazines, illustrating with drawings or photographs, revising long-lived textbooks, or (as in the case of the Reader's Digest) condensation of books and articles into new "derivative" forms require editorial freedom -- especially when decisions must be made fast for publishing deadlines.

1. The Paternity Right.

The paternity right creates potential problems for publishers because of the number of persons who could claim to be an "author" for many types of works. Newspapers and weekly news magazines involve the work of large teams of people, including correspondents, stringers, researchers, writers, editors, and layout artists. Similar team effort is needed for the production of television news and other programming. While "credit" is given where editorially possible and appropriate, the recognition of the right to claim authorship in each such potential "author" would require an index of unmanageable size.

Such a right could also work a serious change in the broadcasting industry. Radio stations rarely identify the composer or lyricist of popular musical works. A recent memorandum by the WIPO and UNESCO Secretariats concluded that "[t]he failure to indicate the names of the authors of the works performed in such cases is an infringement of the authors' moral right."

2. The Integrity Right.

The integrity right poses even greater risks to the dissemination of information.

a. Newspapers and Magazines. Newspapers and magazines of necessity extensively edit contributions and crop and lay out photographs and illustrations to achieve consistency of substance and tone and to conform to space requirements. The tight deadlines under which such publications routinely operate require that editorial decisions be made quickly. Even where a publisher has obtained total rights to use articles or photographs, it is impossible to obtain, for each particular use, the consent of the author in the exercise of his moral right. The author may not be known or promptly found; and, if the authors are several, the problem is compounded. To allow authors and photographers to second-guess such decisions under penalty of litigation and liability undeniably will frustrate prompt publication and clog the editorial job.

b. Broadcasting. Preparation of works for commercial television necessarily entails cutting for insertion of commercials, time limitations or indecency concerns. The producer, director, scriptwriter or other author of a motion picture or program could delay presentation by objecting to such cuts or the inclusion of commercials.

c. Adaptations. Recognition of the integrity right presents special problems with respect to publication of adaptations even where the author has granted the right to make the adaptation. The Reader's Digest -- for decades one of the country's most popular magazines --is a journal of condensations of best-selling books and of articles from other periodicals. The integrity right could substitute legal coercion for the author-editor cooperation by which the Reader's Digest has supplied consumer tastes in many languages throughout the world.

Other members of the Coalition, such as McGraw-Hill, Inc., frequently adapt works for multiple forms of dissemination. For example, news, information and other articles are frequently delivered in a variety of media. Thus, a work of authorship may have to be modified, re-edited and re-formatted for dissemination by wire service, computerized data base, domestic newspaper, international newspaper, and broadcast report, or a magazine article may have to be adapted and reprinted in a newsletter, special report or book that collects articles on a particular topic. Unless the adapter, exercising the grant, makes an adaptation acceptable to the author, the author, exercising the moral right, may complain and sue. At worst, the publisher smarts in damages and is enjoined; at best, he is subject to a lawsuit.

d. Textbooks. A textbook frequently is the handiwork of several authors, including not only teachers but graduate students working under them who have no formal relationship with the publisher, and commonly require substantial editing by the publisher. Moreover, under standard arrangements, college and professional textbooks are typically revised by several generations of authors although the text continues to be published under the name of the original author.

The publisher has traditionally enjoyed, and continues to require, the discretion to make editorial emendations free from the danger of second-guessing integrity right claims. Because universities must be assured of a dependable supply of subsequent editions, and because textbooks often do not pass into profitability until several editions are sold, the risk of multiple moral rights suits by known and unknown "authors" could chill production of such works.

e. Computer Software. Computer software must frequently be modified by publishers to alter the user interface (either to improve appearance or to relate to accompanying written material) or to conform the software to an integrated system. Moreover, software often requires modification and adaptation to meet user needs or to "debug". Such changes must be made free from any risk of an integrity claim.

f. Objections to "Context." A different order problem is created if an author may object to context in which a work is placed as "a derogatory action in relation to" the work. Context claims would greatly amplify uncertainty in publishing. With them, a photographer or graphic artist would be able to object to the subject matter of the text with which his photograph or drawing is associated or juxtaposed, or an author may be able to object to the presence of other authors or articles on disfavored subjects in the publication. A filmmaker may likewise be able to object to the broadcast of his film with certain commercials.

Such a doctrine could easily be abused to harass or discriminate against unpopular works. Context claims depend on the content of a publication. The freedom to control content is at the core of the interests protected by the First Amendment.

3. Effect on Existing Works

The Berne Convention expressly requires that its terms apply to previously created works that are not in the public domain in their country of origin. Thus, most works now under copyright, including books, motion pictures, magazines, and photographs, where all copyright interests have been transferred for valuable consideration, will, suddenly be subject to moral rights claims and demands for further compensation. Such an unforeseen imposition of the moral right upon existing contracts for those works would work all the unfairness of _ex post facto_ legislation.

* * *

The majority of proponents of Berne adherence take the position that no moral rights legislation is necessary for U.S. adherence--the so-called "minimalist approach." Even accepting this premise for purposes of argument, it is unrealistic to ignore the domestic and foreign pressure for expansion of these rights that inevitably will occur once the United States is irrevocably committed to the Berne Convention. And that pressure is likely to be grounded on arguments that expansion is required to comply fully with the obligations of Berne membership. Testimony before the Congress already foreshadows such an effort to expand the moral rights if the "minimalist" approach is adopted.

Perhaps the most dangerous by-product of the minimalist approach would be its likely effect on the development of the common law. Congressional acceptance of the proposition that the moral right (or its equivalent) is already a part of American law would remove the restraints on judicial legislation afforded in the past by judicial rejection of the moral right.

The Report of the Ad Hoc Working Group, which invites judicial legislation, will in all likelihood be cited as a part of the legislative history or ancillary to it. The Report invites judicial legislation by speculating about how the law "might" develop.

The point here, of course, is not whether the courts will do what the Report suggests that they might do. The issue is that adherence to Berne must imply that there is a moral right (or its equivalent) somewhere in American law; that upon the Report's analysis, it lies in large part in state statutory and decisional law; that since the courts have by interpretation of common law principles, or of state or federal statutes, created the right, they are free -- indeed encouraged -- to expand it.

The risks imposed by this expansion of liability will be many times greater in the United States than abroad. The litigious nature of our society, coupled with the questions inherent in radical change in the law, leave little doubt that destabilizing uncertainty and much litigation will result from the incorporation of the moral right.

The risks inherent in the moral right litigation will be high. The moral right is grounded in the author's reputation. Injury to reputation is non-economic and difficult to quantify. Such non-quantifiable injuries have frequently resulted in unpredictable and astronomical jury verdicts with tenuous relationship to the loss. Injunctions against publication may impede the flow of works to the public.

On the foregoing analysis, the Coalition opposes adherence to the Berne Convention. However, the Coalition would not oppose Berne adherence if the principles embodied in the Hatch Amendment were included in the implementing legislation. Such principles would preclude expansion of the moral right, protect the timely, full and effective dissemination of copyrighted works by members of the Coalition, and preserve the delicate balance among authors, publishers, and the public.

* * *

In sum, the moral right is certain to impede the free and effective flow of information and copyrighted works to the public due to their novelty and to the uncertainty surrounding their scope and implementation. Burdensome litigation is virtually assured. Moreover, as discussed below, adherence to Berne and the pressures that will result, both internal and external, will likely result in the moral right being given broad scope as the law develops unless such development is frozen and preempted.

Congressional acceptance of the proposition that moral rights are already a part of U.S. law, without an explicit freezing of the law, would remove the restraints on judicial legislation afforded in the past by judicial rejection of the moral right.

The Coalition is committed to the overall objectives of preserving, strengthening, and expanding copyright protection worldwide. The Coalition does not believe, however, that U.S. adherence to Berne is a necessary or desirable component of policy in achieving this goal in the absence of complete assurance that adherence will not alter a carefully crafted balance and upset decades of settled practice, contract conventions, expectations, and risk allocations.

The Coalition and Senator Hatch have worked toward a position consistent with adherence that would protect the flow of information to the public without upsetting this delicate balance. The Coalition supports the Amendment introduced by Senator Hatch, which represents a constructive step toward resolution of the problems posed by the moral right.

BIOGRAPHICAL STATEMENT

David Ladd is Of Counsel to the law firm of Wiley, Rein & Fielding in Washington, D.C. Mr. Ladd served as U.S. Register of Copyrights 1980-1985, and as U.S. Commissioner of Patents during the Kennedy Administration.

Statement

of

David Ladd

on behalf of

The Coalition To Preserve the American Copyright Tradition

Conde Nast Publications Inc.
Dow Jones & Company, Inc.
Forbes Inc.
McGraw-Hill, Inc.
Meredith Corp.
Newsweek, Inc.
Omni Publications International, Ltd.
Playboy Enterprises Inc.
The Reader's Digest Association, Inc.
Straight Arrow Publishers, Inc.
Time Inc.
Triangle Publications, Inc.
Turner Broadcasting System Inc.
U.S. News & World Report

Before

The Subcommittee on Courts, Civil Liberties,

and the Administration of Justice

Committee on the Judiciary

U.S. House of Representatives

September 16, 1987

©PACT

Coalition to Preserve the American Copyright Tradition

Summary

CPACT, which comprises fourteen major media organizations with large domestic and international book and magazine publishing, broadcasting, video programming and other businesses, is committed to the overall objective of expanding the level of copyright protection worldwide. CPACT does not believe, however, that U.S. adherence to the Berne Convention is necessary or desirable for this objective. The claimed advantages for adherence are being realized by other U.S. policies and initiatives.

CPACT opposes U.S. adherence to Berne because it would introduce the European concept of "droit moral" (translated as the "moral right") into the American copyright system. The moral right is inconsistent with the U.S. tradition of copyright as an economic incentive. Its introduction would disturb the historical balance among authors, publishers, and the public and upset decades of settled practices, contract conventions, expectations, and risk allocations.

Perhaps more importantly, the moral right, which may not be transferable, would interfere with the First Amendment freedoms of publishers by impeding the flow of works of authorship and information to the public and hobbling long-established editorial practices. The moral right also would:

- raise serious questions of author identification in collaborative works such as magazines, textbooks and broadcasts;
- permit second-guessing of split second editorial decisions that are necessary to time sensitive publications or productions;
- cloud the status of adaptations and revisions;
- intrude on content judgments if creators objected to the context in which their work is placed;
- interfere with the editing of films for television; and
- apply retroactively to existing works, thereby jeopardizing settled expectations and investments.

These and other problems inescapably would lead to frequent and expensive litigation for damages and injunctive relief based on judgments based on the highly subjective moral right concepts. As a result, CPACT members could be forced to compromise quality and timeliness in the dissemination of news and information in order to accommodate moral right concerns.

Adherence to Berne simply offers little or no gain internationally in exchange for grave risks in the U.S. Berne adherence is irrevocable; we should not start down a road that the U.S. has refused to take many times before.

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Mr. Chairman and Members of the Subcommittee, I appear today for the Coalition To Preserve the American Copyright Tradition to present its views on the proposed United States adherence to the Berne Convention.

The Coalition comprises the following members: Conde Nast Publications Inc.; Dow Jones & Company, Inc.; Forbes Inc.; McGraw-Hill, Inc.; Meredith Corp.; Newsweek, Inc.; Omni Publications International, Ltd.; Playboy Enterprises Inc.; The Reader's Digest Association, Inc.; Straight Arrow Publishers, Inc.; Time Inc.; Triangle Publications, Inc.; Turner Broadcasting System Inc.; and U.S. News & World Report. These companies, some of our largest international book and magazine publishing companies, as well as major domestic media and programming organizations, are committed to the objectives of preserving, strengthening, and expanding the level of copyright protection worldwide. The Coalition does not believe, however, that U.S. adherence to Berne is a necessary or desirable component of policy in achieving this goal.

I. INTRODUCTION

The Coalition opposes U.S. adherence to the Berne Convention on the grounds: (1) that it will necessarily introduce the moral right into our law and thus (a) disturb the historical balance among authors, publishers, and the public, (b) impede the flow of works of authorship and information to the public, (c) unnecessarily complicate, and even make impossible long-established editorial practices rooted in practical business needs, and (d) present the prospect of litigation, exposure to indeterminate liability, and concomitant uncertainty in publishing decisions and practices; and (2) that U.S. adherence is unnecessary to our nation's interests in strong worldwide copyright protection, particularly since the claimed advantages for adherence can be realized -- and are being realized -- by other U.S. policies and initiatives.

No one disputes the need to improve the world order for the protection of intellectual property. This imperative has in recent years gripped the attention of the private sector, the Executive and the Congress, and has resulted in numerous legislative, diplomatic and quasi-diplomatic initiatives to curb worldwide piracy of copyrighted works and to enhance copyright protection throughout the world. The Coalition applauds these efforts and supports them. In fact, several members have been actively involved with the government in bilateral negotiating efforts directed against piracy.

Nor does the Coalition's opposition bespeak a lack of appreciation or respect for the past achievements of the Berne Convention. Berne established the very idea of general international order in copyright and has, over its one-hundred years served as a stout redoubt for those concerned with maintaining and extending copyright protection. Likewise, the World Intellectual Property Organization (WIPO), and its Director-General Arpad Bogsch, are universally respected for their competence, efficiency, and dedication to copyright and the other fields of intellectual property. For many years, not only has Berne adapted in successive texts to accommodate new technologies and new uses of works of authorship, it has also served as a symbol of aspirations to recognize and support the contributions of both authors and publishers.

That having been said, however, the question is not what Berne has historically achieved, nor its symbolic significance. The questions are how can Berne, in its present condition, serve the interests of the United States; what are the alternatives, today, for achieving its purposes; and what effect will adherence have on authors and their publishers in our country. By "publishers," we mean any entrepreneurs whose efforts lead to the public dissemination, performance, or display of works of authorship.

Adherence to Berne can be accomplished only by a fundamental change in our American copyright system. That change, the introduction of the moral right into U.S. law, is neither needed nor desirable. And that effect is too significant to ignore or slight amidst political pressures to adhere. The basic issues raised by the moral right -- philosophical, legal, and economic -- have become engulfed by political exigencies in this debate. The Congress is told by some that there is no issue and no problem on the question of the moral right. Not so. Nor does drumbeat repetition make it so. The Register of Copyrights has said earlier in these hearings, "It should be stressed that careful Congressional examination of moral rights is essential."[1] The Coalition agrees.

Every major copyright revision in United States history has represented a carefully crafted balance -- struck only after long study, debate, and drafting -- not only between the rights and interests of authors and copyright owners on the one hand and the public on the other, but also between authors and publishers who transform works of authorship into the books, magazines, sound recordings, motion pictures and other vehicles in which those works reach the public. Into those balances the moral right has never entered. To the contrary, American copyright law, in the service of the Constitutional mandate, has consistently rejected the moral right, focusing instead upon the allocation of economic rights and incentives. Within that framework and upon that theoretical base, authors and disseminators have by contract provided the most vibrant and productive copyright milieu in the world.

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[1] Statement of Ralph Oman, U.S. Register of Copyrights, at hearings before this Subcommittee on June 17, 1987 (hereinafter "Oman Statement") at 41.

The introduction of the moral right would alter this traditional balance and upset decades of settled practices, contract conventions, expectations, and risk allocations. Whatever the arguments for the moral right, its introduction would impose upon publishers a new and independent ground for liability and the probability of protracted and expensive litigation, with the prospect of large judgments for reputational torts; and publishers, like authors, are indispensable to the full enjoyment of First Amendment rights. It would substitute legal controls for the present voluntary and flexible collaboration between author and publisher. The ultimate result would be needless constraints upon the flow of copyrighted works from the author's pen to the public's enjoyment.

Neither the "minimalist" approach to the moral right in H.R. 2962[2] for proposed implementing legislation (that is, no explicit definition for the moral right) nor even the thoughtfully drafted moral right provisions of H.R. 1623[3] can avoid those consequences.

Against the palpable disadvantages of importing the moral right into our law must be laid the arguments that to lead in the effort to elevate and extend copyright protection throughout the world, the U.S. can demonstrate its own commitment only by adhering to Berne, that its own domestic law is not an adequate exemplar for that purpose, and that adherence to Berne is a sine qua non in inducing other countries, especially pirate countries, to afford adequate protection. But those contentions are contradicted by the outstanding international leadership of the United States in copyright in recent years, and its notable success -- without Berne.

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[2] H.R. 2962, 100th Cong., 1st Sess. (1987) (drafted by the Department of Commerce and introduced by Representative Moorhead) (hereinafter the "Administration Bill.")

[3] H.R. 1623, 100th Cong., 1st Sess. (1987).

Adherence to Berne is not necessary to witness for U.S. dedication to copyright. Our law does that. The U.S. system as it stands is not inferior to Berne. As the Director General of WIPO has declared, "Furthermore, for joining the Berne Convention, the United States of America will not have to raise the present level of the protection it grants . . . The level of protection in the United States of America . . . is on the level required by the Berne Convention."[4]

By the scope of the rights granted and by the effectiveness with which they are enforced, the United States does, and long has, provided for its own citizens and eligible foreigners as well, a copyright system for which no apologies are necessary and pride is appropriate. Moreover, in recent years, the United States has demonstrated extraordinary international leadership in copyright -- in its domestic legislation, bilateral negotiations, the integration of trade and intellectual property issues, and above all the introduction of intellectual property issues into the present Uruguay round of negotiations in the General Agreement on Tariffs and Trade (GATT). (Indeed, that GATT initiative has been undertaken for the very reason that prospects for progress in WIPO are dim.) The results of this U.S. leadership have included movement toward reduction of piracy in centers of that epidemic in Taiwan, Singapore, Korea, Indonesia, and Thailand.

No other nation has provided such leadership nor attained such results. That leadership has been exerted and those results attained without membership in Berne.

The decision on whether to adhere to Berne is fateful. Under Article XVII of the Universal Copyright Convention ("U.C.C."), if the United States withdraws from the Berne Union, U.S. works would not be protected under either Berne or the U.C.C. in any of the 76 member states of the Berne Union, including the 52 Berne states with which the United States currently has copyright relations under the U.C.C.[5]

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[4] U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 1st & 2d Sess. 10, 15 (1985 & 1986) (statement of Dr. Arpad Bogsch, Director General of WIPO) [hereinafter "Senate Hearings"].

[5] The Appendix Declaration relating to Article XVII,

(continued...)

The decision must be based on a reasoned comparison of the advantages and disadvantages. The disadvantages of Berne adherence will be immediate. The claimed advantages are speculative and remote. Adherence to Berne is not required by our national interest. The Coalition believes that the disadvantages of adherence, particularly those that will arise from the incorporation of the concept of moral rights into U.S. law, outweigh the advantages claimed.

II. DISADVANTAGES OF ADHERENCE

Previously in these hearings, the Register of Copyrights has identified problems raised by proposed adherence to Berne which require careful study.[6] Among them are: (1) the extent to which Berne adherence will constrain the freedom of the United States to modify its domestic copyright law to meet the needs of future technologies or to reconcile the interests of authors, publishers and users of copyrighted works; (2) the effect on existing relationships of retroactive protection of works that are in the public domain and the effect of the denial of such protection on ongoing efforts by the U.S. to obtain retroactive protection for U.S. works in bilateral negotiations; (3) the extent to which Berne may contain self-executing provisions that may override provisions of our copyright law; (4) the requirement that architectural works be protected; and (5) the consistency of Berne with existing U.S. registration and notice requirements. Many of these issues concern the Coalition.

However, the subject of overwhelming concern to the members of the Coalition, and the subject of this hearing, is the effect of the introduction of the European concept of "*droit moral*" into U.S. law. *Droit moral*, which is translated as the "moral right," comprises several specific

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[5](...continued) incorporated as an integral part of the U.C.C., provides, in part, that "[w]orks which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the International Union created by the said [Berne] Convention, after January 1, 1951, shall not be protected by the Universal Copyright Convention in the countries of the Berne Union." As Register Oman has stated, "[t]he penalty [for withdrawal from Berne] is *denial of U.C.C. protection* in Berne countries that belong to the U.C.C." Oman Statement at 9 (emphasis in original).

[6] *See* Oman Statement.

authors' rights which vary according to different commentators.

At least some of these rights are expressly mandated by Article 6 bis of the Berne Convention. That Article requires signatory states to recognize the right of authors "to claim authorship of the work [the "paternity right"] and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation [the "integrity right"]."[7]

The incompatibility of droit moral with the fundamental theory of U.S. Copyright law, the lack of precision in requirements of the Berne Convention on this point, the potential impact upon the public and upon U.S. copyright industries, and the risk of opening the door to future demands for expansion and elaboration all militate against incorporation of droit moral.

Of the various bills for Berne-related statutory amendment before the Congress, only H.R. 1623 specifically proposes a Federal moral right. That bill thus affords an opportunity for full consideration of the issue.[8] We welcome that opportunity.

A. The Concept of the Moral Right Is Outside the U.S. Copyright Tradition and Purpose.

The moral right derives from the European civil law tradition that the author of a work is vested with certain natural rights in his creation.[9] Neither the moral right nor

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[7] Berne Convention for the Protection of Literary and Artistic Works, Paris Act, 1971, Article 6 bis.

[8] The Administration bill simply declares the "intent of Congress" that the paternity and integrity right "be satisfied by United States law as it exists on the effective date of this Act whether such rights are recognized under any relevant provision of Federal or State statutes or the common law and such rights shall neither be enlarged or diminished by this Act." Administration Bill, § 2(b)(1).

[9] See, e.g. Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 Am. J. Comp. L. (1968) (the moral right "give[s] legal expression to the intimate bond which exists between a literary or artistic work and author's personality."); DaSilva, Droit Moral and

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its philosophical premise of the natural law has ever been accepted here.

The Constitution grants power to Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[10] As Congress recognized in enacting the 1909 Copyright Act and the Supreme Court has recently reaffirmed, copyright "under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings."[11] The purpose of copyright in the U.S., therefore, is economic--to provide an incentive to create and disseminate works of authorship, or, in the Constitutional word, "writings."[12] The concept of a droit moral does not comfortably fit with this purpose.

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[9] (...continued) the Amoral Copyright: A Comparison of Artists' Rights in France and the United States, 28 Bull. Copyright Soc'y U.S.A. 1, 7-8 ("French scholars regard the droit d'auteur as a natural right, deeply rooted in the principles of the French Revolution from which modern French jurisprudence emerged.").

[10] U.S. Const., art. I, § 8 cl. 8.

[11] H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909), quoted in Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 n.10 (1984). Cf. Wheaton v. Peters, 33 U.S. 591, 660-61 (1834) (copyright exists by acts of Congress, not under common law).

[12] See, e.g., Sony Corp., 464 U.S. at 429 ("the limited grant [of copyright] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward. . .."); Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'").

The inconsistency of droit moral with U.S. copyright principles has presented an obstacle to Berne adherence since enactment of the Rome text of 1928. Opposition to adherence in 1934 was premised in part on objection to the moral right.[13] Opposition in 1939, in substantial part based upon the issue of the moral right, again blocked Berne adherence legislation.[14] Later, the Universal Copyright Convention was formed to allow the U.S. to enter into a multilateral copyright treaty because the disparities between Berne and American law were irreconcilable. As the Senate Committee on Foreign Relations observed in its report on the U.C.C. in 1954:

> [The U.S.] has found it impossible to subscribe to the [Berne] Convention . . . because it embodied concepts at variance with American copyright law. These concepts involved such matters as the automatic recognition of copyright without any formalities, the protection of "moral" rights and the retroactivity of copyright protection with respect to works which are already in the public domain in the United States.[15]

The latter two differences between Berne and U.S. law are no less acute now than in 1954.

Nor have claims for recognition of the moral right in the U.S. fared well in our courts. Despite numerous attempts to inject such claims into U.S. copyright jurisprudence through litigation, the courts have adhered to the judicially-interpreted Constitutional purpose and, accordingly, have consistently refused to incorporate that concept into U.S. law.[16]

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[13] See, e.g., International Copyright Union: Hearings on S.1928 before Senate Foreign Relations Comm., 72d Cong., 1st Sess. 68-71 (1934) (statement of Edwin P. Kilroe, representing the Motion-Picture Producers of America, Hearings at 69-70) ("A limitation on the right to change the plot, scenes, sequence, and descriptions of the characters in literary works would bring havoc to the film industry.") [hereinafter "Kilroe Statement"].

[14] See Goldman, The History of U.S.A. Copyright Law Revision from 1901 to 1954 (1955) reprinted in Subcomm. on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, Copyright Law Revision, 86th Cong., 1st Sess. 11.

[15] Universal Copyright Convention, Report of the Senate Committee on Foreign Relations, S. Exec. Rep. No. 5, 83 Cong., 2d Sess. 3 (1954) (emphasis added).

In sum then, the adoption of the moral right would represent a basic change in U.S. law, imported from copyright doctrine at variance from that traditionally accepted in the United States.

B. The Moral Right Presents a Risk to the Free Flow of Information to the Public and to the Orderly Conduct of the Business of Copyright Industries.

The members of the Coalition are dedicated to the timely, effective and full dissemination of information and copyrighted works to the public, values at the center of the First Amendment. They have long structured their editorial and business operations on the understanding that the moral right is not a part of our law. The result has been a quality and style of publication unmatched throughout the world. The importation of droit moral would impinge upon the ability of the publishing community to fulfill its crucial function.

The precise contours of this threat are apparent upon examination of the interpretation given droit moral under the civil law. In light of the alien nature of droit moral and its long-standing acceptance in Europe, it is likely that advocates of the moral right and the courts faced with moral rights claims will look to European and other foreign precedents and positions to give content to the rights.[17]

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[16] See e.g., Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947) ("The conception of 'moral rights' . . . has not yet received acceptance in the law of the United States. . . . [w]hat plaintiff in reality seeks is a change in the law of this country to conform to that of certain other countries. . . . we are not disposed to make any new law in this respect."); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 575, 89 N.Y.S.2d 813, 818 (N.Y. Sup. Ct. 1949) (quoting Vargas); Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 70-71, 80 N.Y.S.2d 575, 578-79 (N.Y. Sup. Ct. 1948) ("In the present state of our law the very existence of the right is not clear."), aff'd, 275 A.D. 692, 87 N.Y.S.2d 430 (1949); Geisel v. Poynter Products, Inc., 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968) ("the doctrine of moral right is not part of the law in the United States, except insofar as parts of that doctrine exist in our law as specific rights -- such as copyright, libel, privacy and unfair competition."); cf. Granz v. Harris, 198 F.2d 585, 590-91 (2d Cir. 1952) (declining to accept plaintiff's claim of moral rights violation, but granting relief on other grounds.)

The litigious nature of our society, coupled with the questions inherent in radical change in the law, leave little doubt that destabilizing uncertainty and an avalanche of litigation will result from the incorporation of the moral right whether under the minimalist approach or under the approach proposed in H.R. 1623, which contains general provision for the moral right. Even without Federal recognition of the moral right, creative litigants have already on numerous occasions raised moral right claims. Judicial acknowledgement that the doctrine is not recognized in this country has undoubtedly discouraged countless additional lawsuits.

The risks inherent in the moral right litigation will be high. The moral right is grounded in the author's reputation. Injury to reputation is non-economic and difficult to quantify. Such non-quantifiable injuries have frequently resulted in unpredictable and astronomical jury verdicts with tenuous relationship to the loss. Injunctions against publication may impede the flow of works to the public.

Publishers are all too familiar with reputational damages awarded in libel cases. According to the Libel Defense Resource Center, a not-for-profit information clearinghouse which monitors developments in libel law, the mean damage award in media libel actions tried between 1980 and 1984 was in excess of $2 million, higher than cases involving provable physical injury.[18]

The members of the Coalition, of course, do not object to providing credit to authors where appropriate and possible. The identification of authors in published versions of their works is described by the Ad Hoc Working

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[17] See, e.g., Crimi, 89 N.Y.S.2d at 816-18 (examining French law and the language of Berne to give content to droit moral, before deciding that the moral right did not then exist under U.S. law); Vargas, 164 F.2d at 526 (plaintiff invoked foreign law).

[18] See LDRC Bulletin Nos. 9 (January 31, 1984) and 16 (March 15, 1986). For example, a Las Vegas jury recently awarded more than $19 million in libel damages to Wayne Newton, of which $5 million was for "loss of reputation" and an additional $5 million was for punitive damages.

Group Report as a "prevailing practice."[19] Moreover, authors, like performers, may contract in particular cases to obtain control or veto over the final commercial version of their work.

But recognition of legitimate author interests based upon industry practice and contract is quite different from imposing such rights generally by force of law. As described below, in many cases such powers in the author are inappropriate and not reasonably accommodated. From the examples which follow, the Subcommittee will understand that editing for collective works such as newspapers and magazines, illustrating with drawings or photographs, revising long-lived textbooks, or (as in the case of the Reader's Digest) condensation of books and articles into new "derivative" forms require editorial freedom -- especially when decisions must be made fast for publishing deadlines. That is true both in the case of commissioned works and works by regularly employed authors.

1. The Paternity Right.

The paternity right, as mandated by Berne, creates potential problems for publishers because of the number of persons who could claim to be an "author" for many types of works. Newspapers and weekly news magazines involve the work of large teams of people, including correspondents, stringers, researchers, writers, editors, and layout artists. For example, news magazines frequently survey the nationwide impact of a particular issue, such as the effect of AIDS, by sending queries to several bureaus in major cities. From these collected reports, a team consisting of a writer, editor and researcher "write" the story.

Similar team effort is needed for the production of television news and other programming. While "credit" is given where editorially possible and appropriate,[20] the

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[19] Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Colum.-VLA J.L. & Arts 513, 552 (1986) [hereinafter "Ad Hoc Report"]. Citations to the issue of the Columbia-VLA Journal containing the Ad Hoc Report will be to "Colum.-VLA."

[20] The difficulty of paternity claims in the context of news reporting is demonstrated by Peckarsky v. ABC, 603 F. Supp. 688, 697-98 (D.D.C. 1984) (rejecting a claim for air credit as preempted by the Copyright Act). In examining the companion contract claim, which was not preempted, the court

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recognition of a paternity right in each such potential "author" would require an index of unmanageable size.[21]

Moreover, the work product of any given individual may or may not be reflected in the piece as finally published or performed. The added burden of identifying the authors of the finished product, at the risk of violating a "moral right," would encumber the timely presentation of the news and other information to the public.

Many publications purchase photographs for particular stories from "stock houses" or photo agencies. These agencies frequently do not provide information on the identity of the photographer. Use of such agencies -- and the resulting efficiencies and cost advantage -- could be drastically curtailed if the photographer of a photo so supplied could surface following publication and demand damages for the failure to credit his work.[22]

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[20] (...continued) found it necessary to undertake the difficult task of examining the extent of plaintiff's contribution to the story.

[21] In addition, some members of the Coalition develop large databases with contributions from numerous correspondents and freelancers. Information from these databases is then published. It is unclear whether the contributors to the databases would be considered authors entitled to claim paternity.

[22] The complexities of photographic paternity rights are demonstrated by a case currently being defended by Time Inc. in Brazil. In that case, a Brazilian publisher published a photograph of Nazi war criminal Joseph Mengele. The publisher had obtained the photograph from Life magazine, where it originally appeared in 1981. The Life photo had been taken, with full license, from video footage used in a television program produced in England. The footage in question had been obtained from a Czech film crew. The English producer had advised Life that the Czech film crew did not wish credit for use of the photo. The plaintiff in Brazil, previously unknown to Life, claims that he took the film footage and is demanding unspecified damages for the failure to provide credit.

Adoption of the paternity right could also work a serious change in the broadcasting industry. Radio stations rarely identify the composer or lyricist of popular musical works. A recent memorandum by the WIPO and UNESCO Secretariats concluded "[t]he failure to indicate the names of the authors of the works performed in such cases is an infringement of the authors' moral right."[23]

2. The Integrity Right.

The integrity right poses even greater risks to the dissemination of information.

a. Newspapers and Magazines. Newspapers and magazines of necessity extensively edit contributions and crop and lay out photographs and illustrations to achieve consistency of substance and tone and to conform to space requirements. The tight deadlines under which such publications routinely operate require that editorial decisions be made quickly. Even where a publisher has obtained total rights to use articles or photographs, it is impossible to obtain, for each particular use, the consent of the author in the exercise of his moral right. The author may not be known or promptly found; and, if the authors are several, the problem is compounded. To allow authors and photographers to second-guess such decisions under penalty of litigation and liability undeniably will frustrate prompt publication and clog the editorial job.[24]

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[23] Memorandum of the Secretariats, "Questions Concerning the Protection of Copyright and the Rights of Performers in Respect of Dramatic, Choreographic and Musical Works," Doc. No. UNESCO/WIPO/CGE/DCM/3 (March 6, 1987), reprinted in WIPO, Copyright: Monthly Review of the World Intellectual Property Organization (WIPO), No. 6 at 207 (July, 1987). Although some members of the Committee of Governmental Experts considering the issue expressed reservations, the general principle was accepted. Report of the Committee of Experts, Doc. No. UNESCO/WIPO/CGE/DCM/4 (adopted May 15, 1987), reprinted in WIPO, Copyright: Monthly Review of WIPO, No. 6 at 185 (July, 1987).

[24] In addition, many publications that use photographs use airbrushing to limit the risk of liability by making subjects unrecognizable. One person's legitimate airbrushing may be another's prejudicial alteration.

The news media in the United States, including newspapers and weekly news magazines, provide immediate coverage of uncompromising quality for late-breaking stories. This style of journalism is not possible in nations that adhere to Berne, in large measure because of the delays and editorial compromises required by droit moral. That editorial freedom and its public benefit should not be sacrificed.

b. Broadcasting. Preparation of works for commercial television necessarily entails cutting for insertion of commercials, time limitations or indecency concerns. The producer, director, scriptwriter or other author of a motion picture or program could delay presentation by objecting to such cuts or the inclusion of commercials.[25]

c. Adaptations. Recognition of the integrity right presents special problems with respect to publication of adaptations even where the author has granted the right to make the adaptation, as from book to motion picture or stage.[26] For unless the adapter, exercising the grant, makes an adaptation acceptable to the author, the author, exercising the moral right, may complain and sue.[27] At worst, the publisher smarts in damages and is enjoined; at best, he is subject to a lawsuit.

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[25] Such claims have been made even in the absence of the moral right. See, e.g., Autry v. Republic Productions, Inc., 213 F.2d 667 (9th Cir. 1954); Preminger v. Columbia Pictures Corp., 49 Misc.2d 363, 267 N.Y.S.2d 594 (N.Y. Sup. Ct.), aff'd, 25 A.D. 830, 269 N.Y.S.2d 913, aff'd, 18 N.Y.2d 659, 219 N.E.2d 431 (1966). These cases, which were decided on contract grounds, would have been far more difficult to resolve under the moral right.

[26] Cf. Geisel, 295 F. Supp. at 345, 357 (S.D.N.Y. 1968) (Dr. Suess objected to dolls based on cartoons to which he had transferred all rights on the ground that "the toy dolls destroy the artistic integrity of plaintiff's original work and are so inferior in quality that the use of plaintiff's name in connection with them is disparaging and damaging to him." The court did not address the integrity claim and rejected the defamation claim, finding the dolls "attractive and of good quality."). Testimony before Congress in 1934 described a situation where Warner Bros., after purchasing the motion picture rights to Wunderbar and paying an additional sum to the authors to acquire rights to change the story, were met with a demand for an additional $100,000 on pain of preventing European distribution. Kilroe Statement at 70.

Adaptations are of great concern. The Reader's Digest -- for decades one of the country's most popular magazines -- is a journal of condensations of best-selling books and of articles from other periodicals. The integrity right could substitute legal coercion for the author-editor cooperation by which the Reader's Digest has supplied consumer tastes in many languages throughout the world.[28] Other members of the Coalition frequently adapt works for multiple forms of dissemination. For example, news, information and other articles are frequently delivered in a variety of media. Thus, the work of a single author may have to be modified, re-edited and re-formatted for dissemination by wire service, domestic newspaper, international newspaper, and broadcast report, or a magazine article may have to be adapted and reprinted in a book that collects articles on a particular topic.

d. Textbooks. A textbook is, frequently, in its first and successive editions, the handiwork of several authors, including not only teachers but graduate students working under them who have no formal relationship with the publisher. Commonly such textbooks (like other manuscripts) require substantial editing by the publisher. The publisher has traditionally enjoyed, and continues to require, the discretion to make editorial emendations free from the danger of second-guessing integrity right claims.

Moreover, under standard arrangements, college and professional textbooks are typically revised by several generations of authors although the text continues to be published under the name of the original author. Yet, armed with the integrity right, the original author or his heirs may bar revisions of the original work as a distortion or mutilation. Because universities must be assured of a dependable supply of subsequent editions, and because such textbooks often do not pass into profitability until several editions are sold, the risk of moral rights suits could chill production of such works.

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[27] See WIPO, Guide to the Berne Convention, at 42 ("[T]he adaptor's freedom is not absolute; this 'right of respect' allows the author to demand, for example, the preservation of his plot and the main features of his characters from changes which will alter the nature of the work or the author's basic message.").

[28] The translations themselves form another area where editorial discretion in adaptation is long-established, needed, and fair.

e. Computer Software. Computer software presents unique problems. Software must frequently be modified by publishers to alter the user interface (either to improve appearance or to relate to accompanying written material) or to conform the software to an integrated system. Moreover, software often requires modification and adaptation to meet user needs or to "debug". Such changes must be made free from any risk of an integrity claim.[29]

f. Objections to "Context." A different order problem is created if an author may object to context in which a work is placed as "a derogatory action in relation to" the work.[30] Such a complaint was raised in Shostakovich v. Twentieth Century-Fox Film Corp..[31] There, four Soviet composers objected to the use of their public domain works in what they considered an anti-Soviet motion picture. The court refused to grant relief, in part, on the ground that "[i]n the present state of our law, the very existence of the [moral] right is not clear."[32] In contrast, a French court, hearing the same facts, did find a violation of the moral right and ordered the film seized.[33] If the moral right was introduced into U.S. law, such context claims -- even, as in Shostakovich, with public domain works -- might well be recognized.

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[29] The French recognize the unique status of software. The 1985 reform of French copyright law provides that, absent agreement to the contrary, the author may not object to the modification of a software work by a grantee who has acquired the right to adapt the work. French Copyright Law revision of July 3, 1985, art. 46. See Ginsburg, Reforms and Innovations Regarding Authors' and Performers' Rights in France: Commentary on the Law of July 3, 1985, 10 Colum.-VLA J.L. & Arts 83, 90 (1985).

[30] H.R. 1623 does not include the right to object to a "derogatory action" but appears to be limited to "distortion, mutilation or other alteration". However, the Convention expressly forbids any "other derogatory action" in relation to the work which can not be ignored under the minimalist approach and may, in any event, be read into the provisions of H.R. 1623.

[31] 196 Misc. 67, 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948), aff'd, 275 A.D. 692, 87 N.Y.S.2d 430 (1949).

[32] Id., 80 N.Y.S.2d at 579.

Context claims would greatly amplify uncertainty in publishing. With them, a photographer or graphic artist would be able to object to the subject matter of the text with which his photograph or drawing is associated or juxtaposed, or an author may be able to object to the presence of other authors or articles on disfavored subjects in the publication.[34] A filmmaker may likewise be able to object to the broadcast of his film with certain commercials.

Such a doctrine could easily be abused to harass or discriminate against unpopular works. Context claims depend on the content of a publication. The freedom to control content is at the core of the interests protected by the First Amendment.[35]

3. Relationship of Moral Right to Fair Use.

Core First Amendment interests are also endangered by the apparent failure of the proposed legislation to limit moral rights by the fair use doctrine. The doctrine of fair use is integral to the balance between the interests of authors and the interests of dissemination embodied in the First Amendment.[36]

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[33] Societe Le Chant du Monde v. Societe Fox Europe and Societe Fox Americaine Twentieth Century, Cour d'appel, Paris, Jan. 13, 1953, D.A. 1954, 16, 80, discussed in Strauss, The Moral Right of the Author, 4 Am. J. Comp. L. 506, 534-35 n.56 (1955). The New York court thus was correct in its assertion that droit moral could conceivably "prevent the use of a composition or work, in the public domain." Shostakovich, 80 N.Y.S.2d at 578.

[34] For example, a photographer may object to the publication of his photograph to illustrate an article advocating a political view with which he disagrees, or a scientist may object to the publication of an article on U.F.O.s or other "pop" science subjects in a magazine containing his article.

[35] Cf. L. Tribe, American Constitutional Law 580-81 (1978) ("if the constitutional guarantee means anything, it means that, ordinarily at least, 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,'" quoting Police Department of Chicago v. Mosely, 408 U.S. 92, 95-96 (1972)).

Photographs accompanying news stories frequently depict copyrighted works either incidentally or as the focus of the picture.[37] When the work is incidental to the photograph, the artist, sculptor or architect who created the work is rarely known to the photographer or to the publisher. Liability for failure to provide credit would unnecessarily chill the use of many photographs of public interest.[38] Even where the focus of the photograph is the copyrighted work, it is not always appropriate or possible to identify the artist, sculptor or architect.

Similarly, literary works, motion pictures and other audiovisual works are frequently excerpted, paraphrased or described for purposes of criticism, commentary or news reporting. If the author (or authors, however they may be defined) may object to such uses on the basis of the integrity right, important First Amendment values would be sacrificed.

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[36] See, e.g., Financial Information, Inc. v. Moody's Investors Serv., Inc., 751 F.2d 501, 507-08 (2d Cir. 1984), quoting Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978); Wainwright Securities Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978).

[37] The number of photographs depicting copyrighted works would increase dramatically upon adherence to Berne because of the requirement that architectural works be protected. Although H.R. 1623 would exclude the right to prevent the dissemination of pictorial representations of such works from the economic copyright (section 9(a) (§120(b))), it does not appear to so circumscribe any moral right that may exist in the work.

[38] Although the Berne Convention provides that "the protection of this Convention shall not apply to news of the day nor to miscellaneous facts having the character of mere items of press information," Article 2(8), H.R. 1623 does not so provide. In any event, the exception of Article 2(8) is narrowly drawn to "news" and "miscellaneous facts."

4. Retroactive Application.

The Berne Convention expressly requires that its terms apply to previously created works that are not in the public domain in their country of origin.[39] Although Berne technically does not necessarily apply to domestic works, there has been no indication that any implementing legislation would discriminate against U.S. authors, a result likely to be politically unacceptable. Thus, most works now under copyright, including books, motion pictures, magazines, and photographs, where all copyright interests have been transferred for valuable consideration, will suddenly be subject to moral rights claims and demands for further compensation. Such an unforeseen statutorily imposed obligation of the moral right upon existing contracts for those works would work all the unfairness of ex post facto legislation.

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In sum, the moral right is certain to impede the free and effective flow of information and copyrighted works to the public due to their novelty and to the uncertainty surrounding their scope and implementation.[40] However the

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[39] "This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection." Berne Convention, Article 18(1).

[40] Even beyond the risks of moral rights that directly affect the members of the Coalition, introduction of droit moral would fundamentally alter common law notions of personal property rights, disrupting settled expectations. Droit moral provides the author or artist with a controlling interest in his work even after that work has been purchased by another. For example, in one case, France's highest court, the Court of Cassation, required Renault to complete erection of a monument on its property despite the existence of a contract explicitly providing that the artist would be paid even if the monument were not built. The court reasoned that by commencing construction, Renault accepted the obligation to complete the work "so as to fully satisfy the demands of the artist's moral rights." La Regie National des Usines Renault v. DuBuffet, Cass. civ. 1re, March 16, 1983, Arret No. 229; accord L'affaire de la Fontaine de Rennes, Cour de Paris, judgment of July 10, 1975, R.I.D.A., Jan. 1977 at 114) (finding a city liable for damages under droit moral for destruction of a fountain due to safety concerns). In

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rights are defined by the implementing legislation, burdensome litigation is virtually assured. Moreover, as discussed below, adherence to Berne and the pressures that will result, both internal and external, will likely result in the moral right being given broad scope as the law develops.

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[40] (...continued) Buffet v. Fersing, Cour d'appel, Paris, 1962, D. Jur. 570, the court prohibited the owner of a refrigerator that had been painted by the artist Buffet from selling individual panels of the refrigerator upon Buffet's claim that separation of the panels mutilated his work. In Snow v. The Eaton Centre, 70 Ont. 2d 105 (1982), a Canadian court ordered removal of Christmas ribbons from a sculpture of geese in a shopping mall upon the complaint of the sculptor. The mall owned the sculpture. Similarly, in Crimi, 89 N.Y.S. 2d at 815-18, plaintiff invoked droit moral in an attempt to force a church to restore a fresco owned by the church that had been painted over by the church. The claim was rejected due to the absence of droit moral in the United States. Cf. Serra v. General Services Administration, 86 Civ. 9656 (S.D.N.Y. Aug. 31, 1987) (LEXIS Genfed lib.) (dismissing on sovereign immunity grounds an artist's claim that the government was not permitted to move a sculpture it owned that was disrupting the use of a Federal plaza because, inter alia, "removal to another site would so extensively impair its integrity as to constitute a fundamental alteration and distortion of the work." (Complaint at 46)).

Further, owners of buildings subject to architectural copyright could suddenly find that they were living in a protected architectural work that they could demolish or modify only under certain limited conditions without the architect's permission. See H.R. 1623, § 9(d) (permitting the owners of buildings embodying architectural works to make only minor alterations or alterations that enhance utility without the consent of the author); cf. Les Batiments Occupes par des Services Agricoles en Auvergne, Cour de Riom, March 26, 1966, 2 J.C.P. 15183 (1967) (architect awarded damages for addition of annex building, which allegedly upset "the harmonious balance of the building" and injured "his reputation as a man of art.").

C. Regardless of the Legislative Approach that Is Chosen, Incorporation of the European Concept of Droit Moral Is Inevitable upon Adherence to Berne.

As Chairman Kastenmeier has recognized, "[t]here is no doubt that the Berne Convention requires the recognition of [moral] rights."[41] Legislative efforts to limit the incorporation of droit moral into U.S. law will not protect against foreign and domestic pressure for full incorporation or the risk that U.S. courts will directly or indirectly implement the requirements of Berne. Neither the minimalist approach incorporated in the Administration bill nor the approach of H.R. 1623 provide adequate protection against these risks. Moreover, although the limitations proposed by H.R. 1623 represent a sensitive and scrupulous attempt to cushion the potential effect of the moral right, they fail to resolve the doctrine's problems and may, themselves, be inconsistent with the requirements of Berne.

1. Pressure for the Full Incorporation of Moral Right Is Inevitable upon Adherence to Berne.

There is authority for the proposition that Article 6 bis is intended to be directly applicable and enforceable under the law of signatory nations.[42] But even if Congressional declarations can forestall self-execution, courts faced with moral rights claims will in close cases likely look for guidance to Berne and the laws of those nations that are far more familiar with the rights mandated by the Convention.[43] Thus, there will be substantial pressure for the courts to expand the moral right once recognized.

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[41] 133 Cong. Rec. H1295 (daily ed. March 16, 1987).

[42] As Register Oman stated, "[t]he Berne Convention has three general types of provisions: 1) specific rules that guarantee rights to authors and proprietors; 2) rules that establish more general obligations, leaving the details to national legislation within specified limits; and 3) optional rules whose acceptance left entirely to national law. Absent specific legislation, and depending upon domestic jurisprudence, rules that are susceptible of direct application could be given legal effect by adherence to the Convention." Oman Statement at 11; accord S. Stewart, International Copyright and Neighbouring Rights 48 (1983). If the treaty is not self-executing with respect to directly granted rights such as those in Article 6 bis, this tripartite distinction collapses.

Moreover, once the United States is irrevocably in the door, there is likely to be substantial pressure from other members of Berne for changes in U.S. law. Professor Kernochan recognizes that "[w]ithout [a raising of U.S. consciousness for "author's rights" following Berne adherence], other Berne countries might see our adherence as threatening their own hard won Berne gains for authors."[44]

Once the U.S. adheres to Berne, there will be domestic pressure to broaden the moral right upon the argument that expansion must be done to comply fully with the obligations of Berne membership. Testimony before the Congress already foreshadows such an effort. For example, Professor Kernochan, a proponent of adherence and of the moral right, advocates adherence as a prelude to that objective: "Also important in my view is the pressure Berne adherence should put on us to raise the level of U.S. 'consciousness' about authors' needs and the level of protection we accord our own authors."[45] "I would think we should temper our solutions to maximize the chance of adherence. Once in Berne, then we can and should start the process of reexamining and rethinking the flaws in our own statute and mobilizing the forces necessary to do that right."[46] Similarly, the representative

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[43] See, e.g., Crimi, 89 N.Y.S.2d at 816-18, which looked to French cases and international commentators to give content to droit moral. As Professor Kernochan suggested in his testimony before the Senate, "[the Berne provisions] might not be wholly irrelevant in the resolution of ambiguities". Senate Hearings at 178 (Memorandum of John M. Kernochan, Nash Professor of Law, Columbia University)

[44] Senate Hearings at 167.

[45] Id.

[46] Id. at 165. In response to Professor Kernochan's opinion that "we are sufficiently compatible, considering the pattern of other Berne countries, to join on the problem of moral rights," Senator Mathias replied with his now oft-quoted sally:

> Senator Mathias: It would be your advice to close your eyes, hold your nose and jump? Professor Kernochan: Yes, sir. [Laughter.] But I would not

(continued...)

of three artists' organizations has stated that "after adhering to the Berne Convention we would be well-advised to study adopting an explicit codification of moral rights in our copyright law."[47] These positions are consistent with the observation of Professor Damich of George Mason University, who has stated that "[t]he overly optimistic picture of moral rights protection painted by the [Ad Hoc] Report suggests that there are such other compelling reasons for adherence that differences must be minimized or that adherence would provide strong legal arguments for pushing the law toward full recognition of moral rights in accordance with Article 6 bis."[48]

The experience in the United Kingdom illustrates the danger that adherence to Berne will prompt proposals for changes in U.S. law. The U.K. had maintained the position that its common law adequately protected droit moral under the 1948 Brussels text of Berne. Now that the U.K. is considering adherence to the 1971 Paris text, to which the U.S. would be required to adhere,[49] efforts are underway to change the law to explicitly recognize droit moral, and a draft bill is currently being circulated in the U.K. with such provisions. Similar changes can be expected in U.S. law.

If there is to be debate about the scope of the moral right, the time is now, when the issues can be debated on their own merits, not after adherence to Berne, when obligations of Berne will be cited as requiring further legislation.

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[46] (...continued)

> want to foreclose coming back at some later time as a part of a greater general effort to see what we can do about our own law.

Senate Hearings at 205.

[47] Senate Hearings at 417 (Statement of Tad Crawford).

[48] Damich, Moral Rights in the United States and Article 6 bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, Colum.-VLA. at 662-63 [hereinafter, "Damich Comments"].

[49] "Accession or adherence to earlier versions is closed; if we join, it must be on the basis of the 1971 Paris version." Oman Statement at 9 n.13.

2. The Minimalist Approach Will Encourage Unpredictable and Inconsistent Judicial Legislation of the Moral Right and Does Not Fulfill the International Obligations of the United States.

The Ad Hoc Working Group concluded that current protection of the moral right in the United States is compatible with Berne.[50] However, Professor Edward Damich, commenting on this conclusion, observed that it "is in error insofar as this conclusion is based on the determination that 'substantial protection' is available for the 'real equivalent' of moral rights under American statutory and common law."[51] Further, Professor Damich said, "A comparison of the language of Article 6 bis with the protection afforded moral rights in the U.S. leads to the inescapable conclusion that this protection is virtually non-existent."[52] And, describing the Working Group's Report as painting an "overly optimistic picture of moral rights protection in the U.S., he concluded after analysis:

> In light of the above, it is more accurate to say that a moral rights consciousness is beginning to emerge in U.S. law. It is still, however, a far cry from the requirements of Article 6 bis.[53]

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[50] Ad Hoc Report, Colum.-VLA at 547; U.S. Adherence to the Berne Convention: Hearing on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. (1987) (statement of Malcolm Baldridge) at 6-7 [hereinafter "Adherence Hearing"] ("Our law presently provides an adequate level of protection for an author's right to demand to be named as the author of his works and his right to object to uses of his work that may discredit his honor or reputation. It meets the minimum levels of the relevant revisions of the Convention. No additional changes are needed.")

[51] The Association of American Publishers, commenting on the Report of the Ad Hoc Working Group, observed that the Report's treatment of the moral right issue draws "over-broad generalizations and possibly inaccurate portrayals with respect to domestic law on the subject." Comments of the Association of American Publishers, Inc., Colum.-VLA 650, 655.

[52] Colum.-VLA at 655 (Damich Comments).

[53] Id. at 662.

Professor John Kernochan concurred, saying himself to be "generally in agreement with his [Professor Damich's] observations" and adding the "[t]he conclusion that the U.S. law is comparable with Berne here and recognizes moral rights in any sense comparable to that intended by most of the Berne signatories is tenuous indeed."[54]

But more important than whether the Ad Hoc Working Group is correct is the effect that acceptance of its position will have on the development of our domestic law. Any Congressional acceptance of the proposition that moral rights are already a part of U.S. law would remove the restraints on judicial legislation afforded in the past by judicial rejection of the moral right.[55] Indeed, acceptance of the Ad Hoc Working Group's conclusion is a Congressional invitation to further judicial expansion of the moral right (or its equivalent).

The Ad Hoc Report will in all likelihood be cited as a part of the legislative history or ancillary to it. The Report invites judicial legislation. For example, the Report characterizes Smith v. Montoro as holding that a failure to attribute authorship "may constitute 'an implied reverse passing off' and thus violate Section 43(a) of the Lanham Act";[56] and opines further that "[o]mission of an author's name . . . may constitute a willful prima facie tort",[57] and "publication under the author's name, with unauthorized changes, may violate his right of privacy or publicity."[58]

On a crucial argument in the Ad Hoc Report's analysis, the Report declares that in a recent New York decision the court (not in a moral rights context) implied a contractual covenant of fair dealing, and that "it is likely that courts will apply the implied covenant of fair dealing or good faith to require identification of authors when there is a direct or indirect contractual nexus" -- "[g]iven the prevailing practice of attributing authorship, the public policy favoring it, the cataloging practices of libraries, the public interest in identifying authors of works, and the inherent unfairness of withholding recognition of paternity . . . ."[59] These factors, the Report adds, "might lead courts to rules that the implied covenant of fair dealing required a user to identify the author of a work."[60]

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[54] Colum.-VLA 685, 686 (Kernochan Comments).

[55] See note 16, supra, and accompanying text.

[56] Ad Hoc Report, Colum.-VLA at 553 (emphasis added), citing Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981).

[57] Id. (emphasis added).

[58] Id. at 555 (emphasis added).

The point here, of course, is not whether the courts will do what the Report suggests that they might do. The issue is that adherence to Berne, with no Federal statutory provision on moral rights, must imply that there is a moral right (or its equivalent) somewhere in American law; that upon the Report's analysis, it lies in large part in state statutory and decisional law; that since the courts have by interpretation of common law principles, or of state or federal statutes, created the right, they are free -- indeed encouraged -- to expand it. In deciding how to apply or expand the right, courts will find themselves freed of restraints against looking to precedents abroad, or to the language of the Convention itself. Thus, the minimalist approach would likely lead to de facto self-execution and incorporation of civil law principles into a litigious system frequented by large judgments for reputational torts.[61]

Compounding the problem, most of the doctrines relied upon by the Ad Hoc Working Group are state law doctrines of tort and contract that are far from uniform from jurisdiction to jurisdiction. In addition to inconsistent law, litigants would be faced with choice of law rules to alleged multi-state infringements of rights.

Consistency and predictability, a desideratum of the law in all fields, does not comport easily with the case-by-case development of the law, which is inevitably jagged, uncertain and achieved only in expensive litigation. In the copyright field, which primarily involves interstate and international commerce, such a situation would be unmanageable.

The inconsistency of state copyright laws led to the adoption of the Copyright Clause in the Constitution. At the time of the constitutional convention, twelve of the thirteen states had copyright laws, the provisions of which varied greatly, frustrating consistent national protection for works of authorship.[62] The need for a uniform, national law was so apparent that the Founding Fathers adopted Article 1, Section 8, cl. 8 with little debate.[63] As noted by Madison in the Federalist Papers,

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[59] Id. at 552 (emphasis added).

[60] Id. at 552 n.19 (emphasis added).

[61] See page 10, supra.

> The utility of this power will scarcely be questioned . . . . The States cannot separately make effectual provision for either [the rights of authors and inventors or the public], and most of them have anticipated the decision of this point by laws passed at the instance of Congress.[64]

The problems arising from inconsistent state laws ultimately led to the adoption of the preemption clause of the 1976 Act. As noted by the House Judiciary Committee in its report on the Act:

> Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.[65]

3. H.R. 1623 Raises Many of the Same Questions and Creates Many of the Same Risks as Direct Incorporation of Berne into U.S. Law.

The Coalition appreciates the efforts expressed in H.R. 1623 to face squarely the difficult issue of the moral right by proposing a bill which treats it substantively and explicitly. Unfortunately, and with all due respect, the proposal leaves many questions unresolved. It proposes to limit the moral right in ways arguably inconsistent with the requirements of the Convention. This is not to criticize the bill, for the Coalition doubts whether it is possible to craft any moral right provision without serious disruption to the American system of copyright because of the moral right.

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[62] See H.R. Rep. No. 7083, 59th Cong. 2d Sess. 3 (1907) (Report of the Committee on Patents on proposed revision of the copyright law).

[63] See id. See also 1 Nimmer on Copyright § 1.01[A].

[64] The Federalist No. 43. at 271-72 (J. Madison) (C. Rossiter ed. 1961).

[65] H. Rep. No. 1476, 94th Cong., 2d Sess. 129 (1976).

The bill generally tracks the broad language of Article 6 bis, but that leaves vexatious questions unresolved. For example, the bill does not explain or delimit how and in what context an author may "claim authorship". Nor does it scratch the surface of the troublesome question of when an authorized modification is an unlawful distortion, mutilation or other alteration that is prejudicial to honor or reputation. No standards are provided for determination or evaluation of prejudice to honor or reputation. Indeed, it is not clear whether honor and reputation embody the same or (as is suggested by the disjunctive) different interests.[66]

Just as courts will look to a direct interpretation of the Convention and to foreign law in the absence of any legislative guidance on the moral right, they will be forced to rely on these same sources under the broad language of H.R. 1623. For the reasons discussed above,[67] such a result is unacceptable.

The bill does attempt to limit the moral right in three respects. Each is crucially important: waivability (and possibly alienability), the maintenance of the doctrine of work for hire, and the ability of a publisher to engage in customary and reasonable preparation of a work for dissemination. Unfortunately, the first two limitations are questionable under Berne; the third is an open invitation to litigation.

Waivability. H.R. 1623 does not expressly provide that the moral right shall be alienable or waivable, but does provide that nothing in section 106a (which grants the rights) shall limit the right and power of an author to freely contract concerning his moral rights or invalidate any express waiver by an author of his rights. Section 9(a). Such an uncertain acknowledgment of waivability and alienability raises questions in light of the plain language of the Convention and the tradition of the moral right.

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[66] H.R. 1623 contrasts with the current proposal for legislation in the United Kingdom, which provides numerous pages of specific rights under droit moral. The Coalition does not mean to suggest that it agrees with the conclusions expressed by the British bill; we mean only to highlight the fact that as novel a doctrine as the moral right requires carefully considered and detailed legislation if there is to be any hope of avoiding chaos.

[67] See note 61, supra, and accompanying text.

It is generally accepted that as a reflection of the author's personality, the moral right is not alienable.[68] Although the issue of waivability is less clear, there is authority for the proposition that droit moral is not waivable. Recent French cases have uniformly struck down advance waivers and consents as inconsistent with the doctrine.[69] As Register Oman testified: "the plain language of Article 6 bis (1) indicates that moral rights remain with the author even after the transfer of said [economic] rights. . . this makes it appear that moral rights are neither alienable nor waivable."[70]

In light of the uncertainty over the waivability of the right under the Convention, even if waivability were clearly provided by the bill, there would be a substantial risk that a court would strictly construe the terms of any waiver and would seek excuses to invalidate the waiver. This would be particularly likely in cases of general advance waiver, as by an employed author, or if the court perceived an imbalance in the author-publisher relationship. In any event, the uncertainty and the interjection of standard contract defenses would lead to an increase in litigation, a chilling of dissemination and a further burdening of the judicial system.

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[68] See, e.g., WIPO, Guide to the Berne Convention at 42-3; Sarraute, supra note 9 (discussing the inalienable nature of the right). Thus the bill currently being circulated in the U.K. reportedly provides for waiver but not alienability. Similarly, proposed Canadian legislation provides that "moral rights may not be assigned but the author of a work may waive the rights." Bill C-60, 33d Parl. 2d Sess. § 12.1(3). But see 2 Nimmer, Copyright § 8.21[A] at 8-247.

[69] See, e.g., Champaud v. Editions Legislative et Administrative, Cass. civ. 1re, Dec. 16, 1986, Arret No. 346 (holding void an express waiver of droit moral by an author of a contribution to a collective work); Fox Europe Productions v. Luntz, Cass. civ. 1re, Feb. 77, 1973, Arret No. 101 (holding a director's express contractual waiver of his right to protest changes in the film invalid as a violation of copyright law); Guille v. Colmant, Cour d'appel, Paris, Nov. 15, 1966, Gaz. Pal. 1967.1.17 (holding void as inconsistent with right of paternity, a ten-year contract between a painter and an autodealer requiring the painter to use a pseudonym on half of the paintings produced under the contract and to leave the rest unsigned). French law describes droit moral as "perpetual, inalienable and imprescriptible." Laws of March 11, 1957, article 6.

[70] Oman Statement at 40 (emphasis added).

Even were broad waivers clearly valid under U.S. law, waivers would not resolve the problems posed by the moral right. First, Berne requires retroactive application of the moral right to all existing copyrighted works, including those works to which authors have transferred all copyright interests.[71] Introduction of the moral right would effectively rewrite those contracts, requiring renegotiation and potentially substantial additional payments for past or planned modifications or uses.

Second, the injection of new issues into settled contractual relationships would be disruptive in its own right. Relationships, including freelance and other licensing relationships that have, until now, been conducted informally, would likely require written agreements. The interjection of such formality would inflate transaction costs and impose additional burdens.

Third, in many cases publishers do not deal directly with authors. For example, photograph stock houses sell to publishers without the involvement of the author.[72] Publishers or other copyright owners frequently transfer works or rights in works for further publication. Thus, the ultimate publisher may not have control over whether or not a waiver has been obtained.

Fourth, waivers executed in foreign countries may well, under conflict of law rules, be found invalid. Thus, U.S. publishers could find the need to deal differently with foreign contributors on the basis of their nationality.

In sum, although specific recognition of waivability is essential under any U.S. scheme of droit moral, the Coalition does not believe that waiver resolves the manifold problems posed by the importation of droit moral.

Work for hire. Although H.R. 1623 does not explicitly state that in cases of work for hire the employer holds the moral right, the incorporation of the term "author" suggests the bill's intent that the employer is the holder of the rights granted by Section 106a.[73] The Coalition agrees that such a result is essential but believes there are questions whether the result is permitted by Berne.

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[71] See Section II.B.4., supra.

[72] See note 22, supra, and accompanying text.

Numerous commentators believe that as a reflection of personality, the moral right is necessarily related to a natural person and cannot vest in a juridical entity. As Professor Kernochan has stated, "[t]he work for hire concept is generally antithetical to the droit moral view of art works as linked to the personalities of the individuals who actually create them."[74] This interpretation also is embodied in French law, which grants all droit moral to the employed author.[75] The Ad Hoc Report notes its uncertainty about the issue and concludes that "if Article 6 bis requires the recognition of moral rights in employees in any event, additional consideration of moral rights compatibility [of U.S. law] would seem warranted. Commentary suggests an absence of clarity, at least, on this point. Some authorities may feel that some moral rights, although at a diminished level, must be accorded to employed creators."[76]

The work for hire concept has long been embedded in U.S. law and is essential to the smooth flow of works to the public. Any chance that adherence to Berne would disrupt settled employer-employee relationships or impose the need for formal employment contracts where none now exist is, alone, sufficient reason to oppose adherence.

"Customary standards and Reasonable Requirements." The bill attempts to meet the needs of editorial revision by permitting modifications to a work that are consistent with "customary standards and reasonable requirements of preparing a work for dissemination." Unfortunately, the very uncertainty of the exception ensures litigation.

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[73] "In the case of a work made for hire, the employer or other person for whom the work is prepared is considered the author for purposes of this title . . ." 17 U.S.C. § 201(b).

[74] Colum.-VLA at 687 (Kernochan Comments).

[75] Under the 1957 Copyright Act in France, all rights vest in the creator of the work. Law of March 11, 1957, art. 1. "Thus, traditional French copyright law rejects the American regime of works made for hire." Ginsburg, supra note 29, at 88.

[76] Ad Hoc Report, Colum.-VLA at 616-17 n.9.

Publication and editing needs vary according to a multitude of factors, including the nature of the publication, the nature of the work, the quality of the submission and the availability of time. It cannot be said that there is objective consensus on industry custom, and proof of custom in any particular copyright industry is often contentious in litigation. Nor is it clear whether reasonableness would be interpreted from the standpoint of publication needs, including quality and space considerations, or from the starting position that the integrity of the work is to be preserved if at all possible, however difficult.

* * *

In sum, neither the minimalist approach of the Administration Bill nor the provisions of H.R. 1623 provide for a workable marriage of droit moral as required by Berne with the law and the legal system in this country. Considering the American copyright tradition and the public interest, the Coalition does not believe such a marriage is possible.

III. BERNE OFFERS NO COUNTERVAILING BENEFIT

Thus far this statement has examined the undesirable consequences of adherence to Berne -- primarily the introduction of the moral right. These disadvantages must be weighed against the advantages claimed for adherence, which the Coalition believes to be speculative.

There is no dispute that it is in the national interest to improve worldwide copyright protection. However, even Berne proponents are unable to identify any immediate benefits to the United States achieved by our adherence.

As Elinor Constable, Acting Assistant Secretary of State, testified before the Senate:

> We do not believe that our adherence to Berne will immediately result in a higher level of protection than is now available to our copyrighted works abroad. The real advantage is essentially long term and structural . . . .[77]

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[77] Senate Hearings at 20. The Acting Register of Copyrights, Donald C. Curran concurred: "There is no guarantee of any immediate, large economic gain to U.S. (continued...)

At most, only speculative advantages based on uncertain actions of other nations have been postulated. As the Director General of WIPO testified:

> Accession by the United States of America to the Berne Convention will not change the present situation. . . . Neither will American owners of copyright earn, overnight, more abroad than they do today. The latter will, but only in the future, change favorably if other countries imitate the United States of America, become members of the Berne Convention and will, consequently, have to raise the level of protection they give now to foreigners.[78]

A. Berne Protection Is Already Available to the United States.

Contrary to the claims of the proponents of adherence, Berne will not noticeably increase the level of protection afforded to U.S. works abroad. Berne-level protection is already available to U.S. works through: (a) the national treatment provisions of the U.C.C. and bilateral agreements; and (b) the simultaneous publication provisions of Berne -- the so-called "back door" to Berne.[79]

1. National Treatment Provisions of the U.C.C.

United States nationals enjoy Berne protection in all our major trading partners by virtue of our common membership in the U.C.C. and the national treatment provisions of that treaty. "In the 52 countries that are members of both Berne and the U.C.C., the United States enjoys Berne level protection through the front door of national treatment."[80]

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[77] (...continued) interests. The problems of international piracy . . . will not evaporate if we adhere to Berne, because the nations perceived to be the sites of major piracy generally are not members." Senate Hearings at 52.

[78] Senate Hearings at 10.

[79] Berne Convention Article 3(1)(b).

[80] Oman Statement at 9 (emphasis added).

2. "Back-Door" Protection.

Through the simultaneous publication provisions of Berne, American nationals may also enjoy Berne level protection in those remaining Berne countries which are not members of the U.C.C.

This Subcommittee has heard that the use of the back door by U.S. nationals is unconscionable, that the back door may be slammed shut at any time, and that the costs of simultaneous publication is prohibitively expensive for small copyright owners. These arguments are more rhetorical than real.

First, the mere list of those Berne countries which are not members of the U.C.C. or a bilateral with the U.S. -- and where only the Berne back door is available -- reveals not one major U.S. trading partner: Benin, Burkina Faso, Central African Republic, Chad, Congo, Cyprus, Egypt, Gabon, Ivory Coast, Libya, Madagascar, Mali, Mauritania, Niger, Rwanda, Suriname, Thailand, Togo, Turkey, Uruguay, Zaire.[81] Interestingly, several of these Berne states are international piracy centers.

Second, the threat of a Berne member closing the back door only applies in the countries just listed, since national treatment under the U.C.C. -- the "front door" -- is required independently of Berne in the Berne-U.C.C. member states. In any event, no country has ever closed the back door on the United States.

B. The Present Composition of Berne Vitiates Its Utility To Improve International Copyright Protection.

In the main, the Berne Convention was a European creation initially promulgated by countries with strong copyright traditions and homogenous cultures. Since World War II, however, so many less-developed and copyright-importing nations have joined that, by 1984, 44 of the 76 Berne members were developing countries.[82]

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[81] It is difficult to imagine frequent situations in which copyright owners unwilling or unable to afford simultaneous publication in Canada would wish to publish in such non-UCC Berne states as Libya or Burkina Faso.

[82] U.S. Copyright Office, To Secure Intellectual Property Rights In World Commerce, reprinted in Oversight

(continued...)

WIPO itself acknowledges that the Berne Union has lost its flexibility to expand copyright protection by amending the treaty:

> The high number of the countries party to that Convention (76 at the date of the centenary in 1986), the greater differences in wealth among the member countries and the enormous cultural variety among them make it difficult if not unlikely, at least on major issues, to obtain the unanimity that is required for any revision of the Berne Convention (Berne (Paris) Convention, Article 27(3)).[83]

This conclusion is echoed in an April, 1987 Report submitted to Congress by the General Accounting Office: "Attempts within WIPO to significantly strengthen general international standards in recent years have been unsuccessful due to developing country opposition."[84] The Report thus concludes that "broadly effective gains in protecting intellectual property rights through WIPO do not appear attainable at this time." [85]

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[82] (...continued)
on International Copyrights: Hearing Before Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary, 98th Cong., 2d Sess. 24 (1984).

[83] Berne Convention Centenary 67 (Geneva, 1986). The WIPO report cites computer software and folklore as two subjects on which treaties have proved impossible to conclude. Id.

[84] National Security and International Affairs Division, United States General Accounting Office, Report to Selected Congressional Subcommittees, International Trade: Strengthening Worldwide Protection of Intellectual Property Rights, April 15, 1987 (GAO/NSIA-87-65) at 25 [hereinafter "GAO Report"].

[85] Id. at 38.

C. U.S. Membership in Berne Will Have Little Impact on Curbing Copyright Piracy.

Adherence to Berne also is not likely to curb the international piracy problem. Much piracy occurs in countries outside Berne.[86] If those countries do ultimately adhere to a multilateral copyright treaty, it will in nearly every case be the Universal Copyright Convention, to which the U.S. already adheres.[87]

Moreover, as the GAO Report observes, Berne adherence is no guarantee against piracy:

> Executive branch studies . . . show that many developing countries, although they adhere to the Paris and/or Berne agreements, maintain protection practices that the United States views as inadequate. Further, knowledgeable officials agree that these agreements do not contain effective provisions for challenging countries that do not meet their obligations.[88]

And a 1986 report to Congress by its Office of Technology Assessment identifies sixteen such Berne members "which do not adequately protect intellectual property rights": Argentina, Brazil, Chile, Costa Rica, Egypt, India, Mexico, Pakistan, the Philippines, Portugal, Sri Lanka, Thailand, Turkey, Uruguay, Venezuela, and Yugoslavia.[89]

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[86] See the statement of Acting Register of Copyrights Curran quoted in note 77, supra.

[87] Taiwan is not eligible for membership in the U.C.C. or Berne because it is not a "nation." Singapore has given no indication of an intention to join either. South Korea has declared its intention to join the U.C.C., but not Berne. Malaysia's law is incompatible with both Berne and the U.C.C.

[88] GAO Report at 25.

[89] Intellectual Property in an Age of Electronics and Information, (OTA-CIT-302, April 1986) at 227.

There also is no reason to believe that the piratical practices of certain Berne members are limited to works emanating from non-Berne states. A survey compiled on behalf of the United Kingdom Anti-Piracy Group[90] describes the level of piracy occurring in the Berne member state of Pakistan:

> The market for English language tertiary textbooks (particularly medical) is dominated by pirate editions and all categories of books, domestic and foreign, are seriously affected by piracy which costs UK publishers at least 4 million [British pounds] a year in lost sales.
>
> The pirates supply 95 per cent of the tape market. Of the estimated 18 million pirate cassettes sold in 1985, over half a million were British repertoire . . .[91]

The survey also describes the free circulation of piratical copies of British works in two additional Berne states: Thailand[92] and Egypt[93].

Proponents of adherence argue that pirate nations have resisted U.S. calls for reform on the basis of our absence from Berne. It is folly to credit or even to acknowledge such arguments in this debate. Nations intent upon sheltering piracy will advance any argument of convenience to resist adequate protection. What is relevant as an example is not Berne, but our own high level of protection. Further, American success to date has not been due to appeals to principle, in Berne or elsewhere, but to the prospect of denying U.S. market access or trade assistance to nations that do not adequately protect U.S. intellectual property. The only way to curb piracy is to make it clear that piracy does not pay.

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[90] International Piracy - the Threat to the British Copyright Industries, Publishers Association and International Federation of Phonogram and Videogram Producers (1986). The United Kingdom is a signatory to Berne.

[91] Id. at 24-25.

[92] Id. at 9.

[93] Id. at 10.

D. The United States Already Demonstrates World Leadership in Copyright Protection.

Proponents suggest that Berne adherence is necessary for the United States to demonstrate its leadership in the international copyright community. Although "leadership" is not defined, they suggest that it embraces (a) the ability of U.S. to participate in Berne deliberations and to veto "undesirable" revisions of Berne; and (b) the ability of the U.S. to demonstrate leadership in other multilateral and bilateral fora.

1. U.S. Participation in Berne Deliberations and Veto of Revisions.

Regardless of whether real progress in the service of copyright can be achieved through Berne, the U.S. does and will continue to participate, as a member of the U.C.C., in the joint WIPO-UNESCO conferences on copyright issues. The GAO Report notes that, despite our absence from Berne, "WIPO and U.S. government officials recall no instance of the United States being completely left out of deliberations on any major topic."[94] United States withdrawal from UNESCO has not impaired our participation in these joint WIPO-UNESCO conferences.

Nor is any real advantage to be gained from possessing a formal veto to undesirable revisions. As the Director General of WIPO has declared, "[t]here is no likelihood that the Berne Convention will be revised in the foreseeable future."[95] Notwithstanding, even if efforts to weaken the Convention were made, they probably would be defeated or vetoed by present industrialized countries with interests like those of the U.S.[96]

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[94] GAO Report at 30.

[95] Senate Hearings at 15.

[96] Thus, the 1967 Stockholm Revision, which granted special translation and reproduction compulsory licenses to developing countries, foundered when industrialized Berne states refused to ratify or accede to the text.

2. U.S. Leadership in Other Multilateral and Bilateral Fora.

Here, the "leadership" issue has focussed on: (a) the recent GATT Initiative; and (b) contemporary bilateral negotiations.

a. The GATT Initiative. As a result of deficiencies within the existing multilateral copyright fora[97], the U.S. has sought to address the problem of global copyright piracy as an unfair trade practice within the new "Uruguay" GATT round of multilateral trade negotiations.[98] Proponents suggest that our absence from Berne will complicate the GATT Initiative since it:

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[97] As one would expect, some developing nations wish to deflect the GATT initiative and to confine intellectual property matters to WIPO: "Knowledgeable officials also point out that, through bloc voting, the G-77 [developing] countries can more easily control deliberations in WIPO than in GATT and block substantive action." GAO Report at 38 n.14 (discussing WIPO's inability to deal with patents).

[98] "U.S. policymakers believed [in introducing discussion of counterfeit goods into the Tokyo Round of GATT] that existing arrangements had proven inadequate to effectively control international piracy and stronger measures could be adopted more easily in GATT than in WIPO." Id. at 22.

The GAO Report also explains why greater progress may be attainable in GATT than in WIPO:

> Greater progress may be attainable in GATT than in WIPO for two reasons. First, GATT has a more fluid mechanism for adopting new measures; the members of GATT have not formed voting blocs, largely because of their varying economic interests in the many aspects of trade subject to GATT negotiations. . . . The wide-ranging bargaining that takes place during GATT rounds offers a better chance for obtaining general approval of a maximum participation in any code. . . . Second, GATT dispute settlement procedures, while viewed as needing considerable improvement, are generally considered better than those in WIPO conventions.

> allows trading partners to view the United States as something of a second-class citizen in the copyright world, and question our commitment to attaining the high levels of copyright protection internationally. Achieving meaningful results in negotiations requires leverage. In this area it comes from setting the right example for the rest of the world; and that requires adherence to the Berne Convention.[99]

This argument is overstated. As our government has concluded, Berne membership does not necessarily equate with adequate protection. The United States already is an example to the world. As Dr. Bogsch has declared in the Senate hearings, "The level of protection in the United States of America . . . is on the level required by the Berne Convention."[100] The Coalition strongly supports the drive for a GATT intellectual property code; but believes it is unnecessary to adhere to Berne or to incorporate droit moral into such a code.

b. U.S. Bilateral Negotiations. Moreover, through bilateral negotiations and the use of trade leverage, the United States has influenced movement toward improved protection in the very centers of piracy and counterfeiting -- Taiwan, Singapore, Korea, and Thailand.

The United States, acting unilaterally and employing the tools which Congress has provided, has caused those countries to move forward. In part, this success has been achieved, as in the case of Korea, by a Section 301 action,[101] threatening trade retaliation if Korea did not improve its protection.[102]

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[99] Statement of the U.S. Trade Representative at Adherence Hearings before this Subcommittee on July 23, 1987 (hereinafter "USTR Statement") at 3.

[100] Senate Hearings at 10. See note 4, supra.

[101] 19 U.S.C. §§ 2411-2416 (1982 & Supp. III 1985). Section 301 of the Trade Act of 1974, as amended, authorizes the President to take any "appropriate and feasible action" in response to certain unfair trade practices, including the denial of protection for intellectual property. See 19 U.S.C. § 2411(e)(4)(B).

[102] See Adequacy of Korean Laws for the Protection of Intellectual Property Rights, 50 Fed. Reg. 45,883 (U.S.T.R. 1985) (initiation of § 301 investigation).

And heartened by that success, the U.S. has now commenced an action against Brazil[103] and is considering action against Thailand[104] -- both, interestingly, members of Berne.

As the late Secretary of Commerce Baldridge declared, "we've had some amazing successes [in eradicating piracy and counterfeiting], but often only after a lot of hard work."[105] With hard work, yes; but without Berne.

E. U.S. Membership in Berne Is Unnecessary To Improve Copyright Relations with Canada, China and Thailand.

In his recent testimony before this Subcommittee, the U.S. Trade Representative identified Canada, China and Thailand as examples of where the leverage of U.S. membership in Berne is required. Each deserves comment.

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[103] In 1985, the U.S. Trade Representative initiated a Section 301 investigation of Brazil's informatics policies which, among other shortcomings, failed to provide protection for foreign computer software. See Brazil's Informatics Policy, 50 Fed. Reg. 37,608 (U.S.T.R. 1985). Recently, the intellectual property portion of the investigation was suspended by the President in response to the passage of a computer copyright protection bill by the lower house of the Brazilian legislature. See Determination under Section 301 of the Trade Act of 1974, 52 Fed. Reg. 24, 971 (Memorandum of the President, June 30, 1987).

[104] The U.S. Trade Representative is currently conducting an investigation of Thailand's practices regarding intellectual property protection in relation to its beneficiary status under the Generalized System of Preferences ("GSP"). See Review of Petitions, 52 Fed. Reg. 28, 896 (U.S.T.R. 1987) (items to be investigated during annual GSP review).

[105] Statement of the late Secretary of Commerce Malcolm Baldridge at Adherence Hearings before this Subcommittee on July 23, 1987.

1. Canada.

The U.S. Trade Representative has advised this Subcommittee that:

> U.S. adherence to Berne has become an important issue in our free trade talks with Canada. We are asking the Canadians to make major improvements in their intellectual property regime, including implementation of the obligations of the most recent text of the Berne Convention. Acceptance of new Berne obligations is at the heart of important improvements we hope Canada will make in copyright protection.[106]

That is ironic. For years, Canada has been intercepting U.S. television programming, distributing that programming via satellite, and rebroadcasting it on Canadian cable systems without any payment to, or authorization from, the copyright owners of these works. In response to this systematic theft, Senator Leahy introduced a bill in 1983 which would deny Canadian participation in the distribution of royalties under our cable television compulsory license.

During Senate hearings on this measure,[107] the Copyright Office testified that this could not be done: the U.S., though not a member of Berne, does impose liability for cable rebroadcasts of television signals[108] and, because of national treatment under the U.C.C., must provide similar compensation of Canadian works so used; even though Canada, while it *is* a member of Berne[109], does not afford such copyright protection either to Canadian or U.S. works.

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[106] USTR Statement at 3-4.

[107] *See* Hearing on S.736 before the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary of the Senate, 98th Cong., 1st Sess. (Nov. 15, 1983).

[108] 17 U.S.C. § 111.

[109] Canada subscribes not to the 1971 Paris text of Berne, nor even the 1948 Brussels text, but to the 1928 Rome text, which does not establish, as a minimum standard, liability for cable retransmission.

Canada's upgrading of its Berne adherence from the 1928 text to the 1971 text is not necessary to resolve the U.S.-Canadian dispute. All that is required is for Canada to amend its domestic law to grant to U.S. citizens (and its own) the equivalent protection that the U.S., without the compulsion of the Berne requirement, has long given to Canadians.

"Acceptance of new-Berne obligations" on the part of Canada may be useful in lobbying here for U.S. adherence to Berne, but it need not be "at the heart of important improvements we hope Canada will make." That requires only emulation of U.S. law.

2. China.

The U.S. Trade Representative has also advised this Subcommittee that:

> [T]he Peoples Republic of China (PRC) is considering joining the Berne Convention rather than the U.C.C.. It is indeed ironic that a country such as the PRC could go from having no tradition of copyright protection to being able to adhere to the highest level of international obligations, while the United States, the world's major beneficiary and proponent of strong copyright protection, has not taken the same step."[110]

Not necessarily. China may be "considering" the Berne Convention, but China, like many countries, also may join the U.C.C.; and in that case, the U.S. will have multilateral copyright relations with China.

Further, our two nations already have a trade agreement requiring mutual copyright protection,[111] and in the final analysis, China will not deprive itself of the U.S. market nor our Berne-level protection.

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[110] USTR Statement at 7.

[111] Agreement on Trade Relations, July 7, 1979, United States-People's Republic of China, 31 U.S.T. 4652, T.I.A.S. No. 9630.

3. Thailand.

Finally, the U.S. Trade Representative has cited Thailand as:

> one example of the problems caused by our failure to adhere to the Berne Convention[112] . . . [and that] U.S. membership in Berne would eliminate the problem of obtaining basic copyright protection in Thailand [where] we would receive the same high level protection that other Berne members now enjoy in that country."[113]

This alleged "high level of protection" highlights the absence of any real benefit to Berne adherence. Thailand currently is a member of the 1908 Berlin text of Berne.[114] Despite its Berne membership, Thailand is a center of piracy -- so much so that "on July 15th, the President initiated an investigation of Thailand's copyright practices under the GSP annual review measures."[115] Thus, the United States, by joining Berne, can enjoy the same level of piracy "that other Berne members now enjoy," including the United Kingdom, a Berne member, which also has complained about piracy in Thailand.[116]

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[112] USTR Statement at 5.

[113] Id.

[114] As should be evident by now, the Berne Convention is not one uniform set of standards. A member state's obligations vary depending upon the particular Berne text it subscribes to. For example, rather than subscribing to the 1971 Paris text, regarded as requiring the highest levels of international copyright protection, Thailand subscribes to the 1908 Berlin Act, Canada subscribes to the substantive provisions of the 1928 Rome Act, while the United Kingdom, Argentina, Belgium, Israel, Norway, South Africa, Switzerland and Turkey subscribe to the substantive provisions of the 1948 Brussels Act.

[115] USTR Statement at 5.

[116] See Report, supra note 90.

IV. CONCLUSION

The Coalition is committed to the overall objectives of preserving, strengthening, and expanding copyright protection worldwide. The Coalition does not believe, however, that U.S. adherence to Berne is a necessary or desirable component of policy in achieving this goal. Adherence to Berne can be accomplished only by a fundamental change in our American copyright system -- the introduction of the moral right into U.S. law. Its introduction would alter a carefully crafted balance and upset decades of settled practice, contract conventions, expectations, and risk allocations. Moreover, the benefits claimed to result from adherence are speculative and remote.

Senator DECONCINI. Thank you, Mr. Ladd.

I presume, Mr. Carter and Mr. Ladd, you concur with Mr. Kummerfeld that if the recent Hatch amendment were put in on the freeze, then you would support it. If that was part of this implementing legislation, you would support it.

Mr. CARTER. Yes, sir.

Senator DECONCINI. Let me just say that with the overwhelming testimony we have had this morning and 2 weeks ago, I find it really interesting that your position is what it is. You are saying:

> If you take care of us, we will go for something that is overwhelmingly supported and needed, but by God, if you don't take care of us, we are going to oppose the legislation because you guys won't take a position; you just leave the status quo.

Isn't that a lot better than if we were trying to really ram something down your throat. It seems to me, in all respect to us, that so far at least we seem to be taking a position that we are not going to touch moral rights. Why isn't that enough for you, rather than to get your support—which I am very interested in having on this legislation—that we have to go so far as to freeze it? Why can't we negotiate from the standpoint that we are not going to touch the moral rights issue? That may be the case. Maybe Representative Kastenmeier will mark up next week, and we think that is what is going to happen. We don't know, of course. Aren't you really achieving something there, when you see all this evidence of the need because of piracy problem?

Mr. KUMMERFELD. Well, if I can just address that, and then turn it over to Mr. Ladd, who is an expert. Neither Mr. Carter nor I are copyright experts or even attorneys. The issue, the factual issue as to whether the fact of adherence, while remaining silent on moral rights, changes something, is a question I want Mr. Ladd and the experts to argue. There may be a difference of opinion.

We are relying on our individual experts, copyright counsel in our individual companies, as well as our association. The coalition, I believe, is relying on Mr. Ladd's expertise, and this should be a factual question. We believe that just adhering without any specific language along the lines of the Hatch amendment does change the balance of rights and does change this delicate series of compromises and balance that we have achieved over a number of years which enables us to get our magazines out in a practical way.

Senator DECONCINI. I guess what troubles me, Mr. Kummerfeld, is that in your statement you say this is good legislation.

Mr. KUMMERFELD. Yes.

Senator DECONCINI. The Berne Convention should be implemented legislation——

Mr. KUMMERFELD. Yes.

Senator DECONCINI [continuing]. And it is really important to us, and all this preceding testimony that we have had is very significant, but we have such a channel vision here that the fact that you don't mention moral rights is enough that we just have to take a very selfish, restricted view here, even though it is overwhelmingly good for the country and for intellectual property rights of American artists and producers and publishers. I am surprised at this restricted view. Maybe you would like to respond.

Mr. LADD. May I respond to that, too? Let me respond first of all to the question of why we want this freeze, and especially insofar as it will apply to State law doctrines.

In the Ad Hoc Working Group's report, the analysis in the report leads to the conclusion that there are now lying around in various places in American law, State and Federal, elements which in their totality constitute the equivalent of the moral right. There is also a substantial section which talks about how the law might develop and be extended, particularly in respect to State law, how those precedents might be expanded. Now it is those potential expansions of State law doctrine in this field that we are concerned with, and it is those that we want frozen.

Senator DECONCINI. Can't you address each one of those as they come up? You would have to do it anyway, wouldn't you?

Mr. LADD. You mean in the legislatures?

Senator DECONCINI. Sure.

Mr. Ladd. Yes, but if there is going to be a moral rights law, and if Congress is going to create one, then in the meantime we want to be protected against the kind of liabilities which these gentlemen have talked about until Congress works its will.

Mr. Carter. Mr. Chairman, in speaking to that, I feel rather unfairly cast in the position as an obstructionist because I don't feel that way coming in. I do feel that in the question you have just asked, the technical advice on that, we are relying on the best counsel we can find, but it seems to me that this is indeed the forum to be supportive, not obstructionist. We are supporters, but this is the time in which to gain all of the advantages of the Berne Convention and at the same time satisfy—at the very same time—satisfy those real dangers that we have described.

Senator DECONCINI. Well, I don't want to get into a confrontation here, either, but we have hundreds of letters coming in opposing implementation legislation. I have to assume it is generated by you and your clients. I don't know where else it is coming from.

Mr. Carter. Some of it has been, sir.

Senator DECONCINI. And it seems to me, I just can't imagine somebody sitting in Arizona watching the Cubs' spring training who all of a sudden decides, "I think I'll write a letter to Senator DeConcini about Berne." [Laughter.]

Maybe about Bork or something else, but not about Berne. In any event, it——

Mr. CARTER. I am not responsible for Arizona.

Senator DECONCINI [continuing]. Just occurs to me that I would like to find if there is any other ground here, and I sincerely make this offer to consult with you before we do any markup, I'd like to know if there is any other ground, other than just adopting the Hatch amendment.

I yield to Senator Hatch.

Mr. LADD. Senator Hatch, before you ask me a question, may I make one further comment about this colloquy which has just taken place?

The statement that I have made, that we respect the sentiment which has been expressed here for adherence to Berne, I did not mean to say that we acquiesce to what we believe are the overstated advantages of adherence to Berne, but that is not what we are discussing now. We are discussing a way to try to resolve the moral rights problem.

Just to keep this in balance, I think it is well to remember that the General Accounting Office told the Congress in recent years that attempts within WIPO—that is to say, the Berne administering organization—to significantly strengthen general international standards in recent years, have been unsuccessful due to developing country opposition. The GAO concluded that broadly effective gains in protecting international property through WIPO do not appear to be attainable at this time. Now I am sure you do not want me to go through a debate on all of the points which have been made in favor of the——

Senator DECONCINI. Yes, I appreciate that, but of course the main argument the nondeveloping countries use is that we are not a member, so what status do we have?

Senator Hatch?

Senator HATCH. Well, thank you, Senator DeConcini.

I have heard repeatedly from a whole variety of sources that you are concerned about ratification of the Berne Convention, you are concerned about it opening doors to moral rights in this country and you believe that it is going to do that, but I personally believe that is speculative and that you are relying about false concerns about what a court might or might not do in the future.

I don't blame you for worrying about that because it is a serious issue, and so forth, but how do you respond to that point, that really that is what you are worried about, just a speculative issue about whether or not the courts are going to do something about this in the future, and might do it in a manner that might be inconsistent with what you would like?

Mr. LADD. Is that question directed to me?

Senator HATCH. Sure, all three of you.

Mr. LADD. There cannot be any experience in the United States under the moral right because we have not had the moral right here. In the fuller statement, which has now been made a part of the record, in the House——

Senator HATCH. You have had moral rights but you have had them basically through the collective bargaining process. Right?

Mr. **Ladd**. Well, OK, but I wouldn't call those moral rights; I would call those contract rights.

Senator **Hatch**. Well, but in essence that is what some people call moral rights.

Mr. **Ladd**. But you are right, that many of the powers which the moral right is intended to vest can be achieved by contract and negotiation, and indeed are.

Senator **Hatch**. So even though, let's say, the courts don't speculate and don't go broader on moral rights, as you would like them not to do, the individual authors or copyright holders can bargain for better moral rights through the contractual system. There is nothing stopping them from expanding their moral rights if they have the leverage to get them.

Mr. **Ladd**. Yes.

Senator **Hatch**. OK. Well, let me just ask, and I know that all three of you have given some indications here, but really what protections can be built into any kind of implementing legislation to ensure that any disruptions caused by moral rights do not occur? Does the Hatch amendment go far enough? Is it something that will be worthwhile?

Mr. **Ladd**. Well, the purpose, as I understand your amendment, Senator, is simply to maintain the status quo until what is clear to be a later legislative debate on what is going to constitute the moral right. The people who will appear in the panel behind us, regardless of the outcome here, are not going to be contented until they feel that their demands for a full statutory moral right of their liking is enacted; so, that is coming, and the only purpose of the amendment is to freeze the law until that later debate.

Mr. **Carter**. But to answer your question for myself, the Hatch amendment does give us that satisfaction.

Senator **Hatch**. You would be happy if the Hatch amendment was adopted?

Mr. **Carter**. Yes, sir.

Senator **Hatch**. See, because I hasten to point out that the Hatch amendment was filed basically to create discussion, just like Kastenmeier was, and to see if we can resolve this problem among competing good interests.

Mr. **Ladd**. Yes. Senator Hatch, I apologize. I think I now understand the thrust of your question. If the Hatch amendment objective were achieved, laying aside for the moment the question of what appropriate language would ultimately be used, would the coalition then oppose Berne adherence? The answer is no, we would not.

Senator **Hatch**. In other words, if the Hatch amendment is adopted, then the coalition would not oppose this bill.

Mr. **Ladd**. That is correct.

Senator **Hatch**. And that would freeze present law. It would allow the courts still to make decisions.

Mr. **Carter**. Yes.

Senator **Hatch**. And you would take your——

Mr. **Carter**. Nor would my organization oppose.

Mr. **Kummerfeld**. Yes. I would like to say we are not trying to use this legislation to improve the rights of publishers and editors vis-a-vis creators. We have no intent to do that. We simply want to make sure that we don't inadvertently damage this delicate balance of rights between the two groups through adherence to Berne. We seek protection against our position being severely damaged and having the difficulties that Mr. Carter has discussed, but we are not here trying to improve our position and upset that balance of rights.

Senator HATCH. Well, as you know, we are now in a contest between competing factions here, and what we want to do on this committee, it seems to me, is do what is right under the circumstances. That is why I filed the Hatch amendment, but I presume from listening to you that you are willing to sit down and help us to resolve this problem, and we hope the other side will be willing to sit down with us as well, because we think it ought to be resolved. We think it is in the best interests of our country, the best interests of creative people.

On the other hand, see, I think the other side has to understand the situation that yes, they may when they start out be in a less leveraged position, but they also can negotiate these rights as well in either collective bargaining agreements or contractual agreements that are entered into, so they are not bereft of those rights if they want to negotiate them. What you don't want is for them to have an automatic advantage caused by law, or by some interpretation of these foreign laws that we finally adopt or at least agree to.

Mr. LADD. I predict, by the way, Senator, that if the United States were to adhere to the Berne Convention without this kind of a freeze, that you are going to hear arguments later on that the premise that the present-day equivalent is not sufficient to satisfy Berne, and that the Convention requires us to have something in excess of that. All I am saying is, don't be surprised if those arguments are made. I expect that they will be.

Senator HATCH. I expect they will be, too, but we are interested on this committee, as far as I can see it, in good faith, doing what is best for all concerned. What I am calling upon everybody to do is sit down with us and help us to do that, because I think there is a tremendous advantage to us to get this matter resolved appropriately and I think we can do it.

You know, we are going to have to make a decision in the end as to what to do, but hopefully it will be a decision where all parties will say, "Well, we didn't get everything we wanted but it's a decent decision and we are going to go with it." I am not particularly speaking for other members of this committee but I hope that we can all do exactly that before it is all said and done.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Hatch.

The Senator from Vermont?

Senator LEAHY. Mr. Chairman, thank you very much. I find the testimony this morning of this panel—I was going to say "interesting"—I find it fascinating. Mr. Ladd, you testified last year that the benefits of U.S. adherence to Berne were "speculative and remote." Mr. Kummerfeld, today you said that, on behalf of the Magazine Publishers of America, that "We too believe there may be some benefits for our companies in Berne adherence, such as increased piracy protection."

Mr. KUMMERFELD. Right.

Senator LEAHY. Are you for Berne or against it?

Mr. KUMMERFELD. We are, as we have stated, for it. We wonder whether all of the protection that the previous panel hopes we will get will occur, but we hope it does. It is a good thing for our industry as well as for the other industries that were represented here.

Senator LEAHY. But you are for Berne?

Mr. KUMMERFELD. We have no objection to Berne, provided that the balance of rights that we have described, that have evolved over years and years between publishers and authors, isn't upset as a result of our joining Berne. If it is going to upset that, then we think that should be addressed directly by the Congress.

Senator LEAHY. Well, let's be specific on that. You referred to the Hatch amendment, which I don't believe is yet an amendment. I think he put in the record here today so we could look at it, but we are all speaking of the same thing. Are you saying that absent that amendment, you are opposed to joining Berne?

Mr. KUMMERFELD. Absent that amendment, we think that the damage to our industry from joining without that kind of protection would exceed the potential benefits on international piracy from joining.

Senator LEAHY. Is that a yes? I mean, without the amendment—let me just repeat the question, I want to make sure I get it clear.

Mr. KUMMERFELD. That is correct.

Senator LEAHY. Without the amendment, are you saying you and your association would oppose joining Berne?

Mr. KUMMERFELD. Yes, that's correct.

Senator LEAHY. So aren't you and Mr. Ladd really wanting to have it both ways? You are saying you want Berne because that is an advantage to you, but you want to kill any possibility of anybody who wants to raise a question of moral rights later on. You want to remove any conception that they might seek any advantages to themselves later on, provided you get your advantages today.

Mr. KUMMERFELD. No. I said just a moment ago, Senator, we don't seek any advantages. We don't want to improve our position vis-a-vis where it is today. We just want to make sure that it doesn't get changed inadvertently by joining Berne. We want to freeze the existing relationships until the Congress addresses the issue, if it chooses to address the issue, in substantive legislation on moral rights.

Senator LEAHY. Well, that is not precisely what you said. As Mr. Carter said, this is the time to get all the advantages of Berne, but you are really saying, "Sure, but lock the door on anybody else."

Aren't you saying that what you want is for us to give your association the advantages—and I think the testimony has been virtually unanimous that there would be great advantages for you, great advantages for anybody that has to deal in international commerce for copyright—give you all those advantages of Berne, but for us to make a decision today, without any of the debate that normally goes on in a democratic society, that we will close the door on somebody raising the issue of moral rights later on; that we will say in the law, "You don't have a question of moral rights. Don't go to our courts. Don't go to our State legislature. Don't go anywhere else. We decided it at the time we gave everybody else the advantages of Berne."

Now maybe I missed something in here, Mr. Kummerfeld, but it sure reads that way.

Mr. **KUMMERFELD**. Well, I won't give you a technical answer. I will leave that to Mr. Ladd, but I will say that we don't believe that the door is closed on anything, either in the legal system, in the courts, or in the Congress and future legislation. You could open hearings on moral rights the day after this legislation is enacted.

Senator **LEAHY**. Let me just tell what anybody—take my own State of Vermont or the chairman's State of Arizona or Mr. Hatch's State of Utah—anybody sitting in that State, here is what they read. I mean, here is the amendment. Let's just read it:

> That no author or author's successor in interest, independently of the author's economic rights, shall be entitled on and after the effective date of this act to any moral rights under any Federal or State statutes or the common law.

They certainly couldn't sue in Vermont. They couldn't sue anywhere else. I mean, talk about closing the door, wow! Bang! [Laughter.]

I mean, you not only want to kill them, you want to make sure we drive a legislative stake through the heart of moral rights. This body is never going to rise again, full moon or not. [Laughter.]

Mr. **LADD**. Senator Leahy?

Senator **LEAHY**. Yes, Mr. Ladd?

Mr. **LADD**. That is humorous but incorrect. That section is intended to be a part of a distinction between something called the moral right and something called the "equivalent" of the moral right. The next section says:

> Any right of an author or an author's successor in interest, whether under any provision of Federal or State statutes or the common law, that independently of the author's economic rights is equivalent to any or all of the moral rights or any part thereof, shall not on or after the effective date of this act be expanded or enlarged, either by Federal or State statute or by judicial construction.

So the purpose of this, the draftsmanship may very well be improved, but there was no intention to wipe out those principles of law which are established in decisional law now or even, in some States, in the statutes. That is the purpose.

Senator **LEAHY**. Mr. Ladd, I don't think I am being incorrect with this. Let's go down through some of the statements. You say that you can support U.S. adherence to Berne if the implementing legislation contains adequate protection against moral rights. Is that——

Mr. **LADD**. We didn't say we would support it, and I want to make my own statement on that point.

Senator **LEAHY**. OK.

Mr. **LADD**. We will withdraw our opposition. In the fuller statement which has been filed, we have explained in considerable detail why the advantages of adherence to Berne have been substantially overstated. For example, on the "back door" argument. I don't think you want me to rehearse those arguments here. I certainly don't want to do that, but they are there.

The position of the coalition has been, when considered against the claimed advantages for adherence, against the risk to their interests which they perceive by the introduction of the moral right as defined and applied in France, that they certainly do not want to adhere. As a matter of fact, the coalition's preference would be that we not adhere. But our position is that this amendment, if adopted, would ease our concerns considerably. It is inaccurate to say that we will support adherence to Berne. We will withdraw our opposition.

Senator LEAHY. That's fine. I really do see it as closing the door to any question of moral rights. I am willing to have a bill that does not go into the question of moral rights here, that just goes strictly to Berne, but if we go beyond that, you will withdraw your opposition and I will instill my opposition, so we would probably reach a stalemate.

Let me just say this. My bill makes it clear the Berne treaty is not self-executing. Litigants can't come into the U.S. courts and claim rights directly under the Berne treaty. Now Senator Hatch's bill is almost identical on that point. Second, my bill makes it clear that most of the experts believe U.S. law as it now stands fully satisfies Berne standards in the field of moral rights, and Senator Hatch's bill says virtually the same thing.

My bill specifically states any right or interest in copyrighted works "shall neither be reduced nor expanded" by U.S. adherence to Berne. Senator Hatch's bill says much the same thing: "Rights in cooperative works shall neither be enlarged nor diminished by adherence to Berne."

I understand you are worried that if the United States joins Berne, that magazine publishers are going to have to make some drastic changes in the way they now do business with freelance writers and photographers. In light of the provisions I have just summarized, why do you think our bill is going to change any way you have to do business?

Mr. LADD. I am going to let the men from the industry explain that to you.

Mr. CARTER. I will tell you right now, there is great confusion. We come down to this issue as to the interpretation, the legal interpretation of the bill, what the result is going to be. The best advice that we have from our counsel in the industry is that it will not maintain the status quo but will open this process to radical change.

Senator LEAHY. You mean radical change from laws in other countries?

Mr. CARTER. No, radical change in the way that we have been doing business here, in terms of the relationships between editors and freelance photographers and writers and the rest of the business, in that most of our contracts are not written contracts. That is very rarely the case. Most of the contracts are verbal contracts. They are agreements that have been operating and understood on both sides.

The question is, it is suggested——

Senator LEAHY. I wonder if you could expound on that just a little bit.

Mr. CARTER. Yes, sir.

Senator **Leahy**. Give me an example of where legislation for adherence to Berne would change in any way the way you deal with, say, a freelance photographer.

Mr. **Carter**. All right.

Senator **Leahy**. Mr. Atherton, for example. I mean, how would you deal——

Mr. **Carter**. Fine. I would assign a photographer, Mr. Atherton, to cover the hearings on the Berne Convention. I would just call him on the telephone and say be there at 9:30 in the hearing room, I want you to shoot black and white and color, give us about a couple of rolls of each, be sure you get all of those who are testifying and be sure you get very nice pictures of the Members of the Senate. [Laughter.]

Senator **Leahy**. We have already told him that anyway.

Mr. **Carter**. Yes, and I will say at our usual rates. If we have worked before, he will know that that is $400 a page for color and it is $250 for anything that we use on black and white, we'll say. That has been worked out.

Now when that comes in, my art director will make a choice, will crop in, will cut various things, even though not exactly the way that the photographer has framed and printed them. All right. He may object. Mr. Atherton is a sensitive individual, one can tell, and may object to the way that this is done and the fact that it runs only in a single column rather than a full spread, which is what he had in mind when he photographed this.

Right now he doesn't know that until the magazine comes out. There is no question of an injunction. There is no such thing. I have not given him the right of written approval or any kind of approval over the use of this, other than this agreement. It is a verbal contract. He gets a check. He quickly cashes the check, and that completes it.

The best advice that I have and the American Society of Magazine Editors have from our counsel is that the legislation now proposed would, under what is the so-called moral rights clause, require that we have an understanding that any change I want to make, I need his approval; that I am subject to Mr. Atherton's approval before I can proceed to publish.

Senator **Leahy**. Mr. Carter, let me tell you—and I know my time is up, but I will stop on this—I have done a lot of photography for a lot of magazines, and I see nothing that would change whatever rights I have today under my legislation. I realize we disagree completely on that.

I do see a real concern in your suggestion that it may well lock out any future consideration, adequate future consideration of moral rights. I think that it is going to lose the support of some who would like to see a moral rights bill actually attached to Berne but are holding off just to allow Berne to go through this year. If they see this going so hard the other way, they will withdraw their support. I think we will be in a stalemate and next year, the next Congress, we will just start all over again on the subject.

Thank you, Mr. **Carter**. I understand your concern and I appreciate it.

Mr. **Carter**. Thank you.

Mr. **Ladd**. May I make one final response?

Senator DECONCINI. Certainly, Mr. Ladd.

Mr. LADD. If you don't have time, Mr. Chairman, I can submit a later comment.

Senator DECONCINI. It depends on how much time you want for that response.

Mr. LADD. But to respond to your question, Senator Leahy, again, what the coalition is concerned about is what may happen in the area of the "equivalent to the moral right" under State doctrine before we enact any Federal statutory provisions. Let me give you a specific example of a development in that area which would change the way the magazines operate. This is based, incidentally, on an example which was given in our statement.

Magazines frequently buy stock photographs from stock photograph suppliers. Frequently, the authors of those photographs are not known. The magazine wants a picture of Shanghai Harbor or a picture of rebels in Afghanistan, and they buy these stock photographs, and they do it quickly, as in the news magazines, for example. Now they don't have to worry about identifying that by the photographer's name.

If in the immediate future a court, following the direction of the Ad Hoc Working Group's report, extended the paternity right by common law doctrine to require the identification of authors, that would change how these magazines operate, and there are other examples that can be given.

Again, what we are saying is, we are accustomed to living with the law that we have now, including that which is found to be the equivalent of the moral right, but because several of the witnesses in supporting the Berne convention have emphasized the fact that the law in this area of equivalents is evolutionary, that is the evolution that we are concerned about and that is why we want the freeze.

Senator LEAHY. Mr. Ladd, we could go on forever and I am not going to take up further time, but I would just point out in the example you have given, I have sold photographs I have copyrighted. When they are used they do have my byline on it and they do have the copyright. I have sold others that aren't copyrighted and they have no byline.

I really think you are setting up a specter that doesn't need to be there, but I would be happy to discuss this further with you after the hearing. You know I have a great deal of respect for your expertise and I would be happy to discuss it further with you.

Mr. LADD. Thank you, Senator.

Senator DECONCINI. The Senator from Alabama?

Senator HEFLIN. Do you pursue a simultaneous publication procedure in any of your products? Have you done that?

Mr. CARTER. Not personally, I have not, sir.

Mr. LADD. I do not know that as a matter of confirmed fact, but it would be almost inevitable that some of the book publishers in the coalition, probably all, have followed the simultaneous publication procedure.

Senator HEFLIN. Well, this raises a question. How do countries like England or Canada comply with the moral rights provisions when publishing magazines, and how do you, if you have had simultaneous publication?

Mr. **Ladd**. If you have multicountry publication, even though there is no moral right in the United States, could you run into trouble in other countries which do have it? Is that——

Senator **Heflin**. Yes, that's it. How do you comply with those provisions, and how do other countries? England and Canada publish magazines and they have photography.

Mr. **Ladd**. I cannot answer that question as a matter of practice.

Mr. **Kummerfeld**. Well, let me take at least a stab at it. I'm not sure we have any simultaneous publication magazines. We have magazines with foreign editions, but they usually have their own editorial and their own sources that are significantly different than the U.S. version.

But if you are asking the broader question of how do publishers in countries that belong to Berne deal with this issue, we have talked to many of those publishers. In fact, I was just in Europe at a magazine convention a few weeks ago, and I asked every publisher I could find.

They said:

> Well, the thing you have to understand is, we don't litigate in our society the way you do in America. If all of our freelance authors were represented by attorneys as agents, we would probably have a lot of litigation under the moral rights provision that we don't have. It just wouldn't occur to our people to litigate over a disagreement and to invoke moral rights, but we recognize that you have a different situation. Everybody sues everybody over a contract in America, sooner or later, and it is probably a bigger problem for you than for us.

Senator **Hatch**. Well, do they face the same type of deadlines or editing problems that you would anticipate that you would, do they?

Mr. **Carter**. Yes, they do. Those are identical. Those problems are the same. The staffing is not the same, in terms of staff writers as opposed to freelance writers, staff photographers as opposed to freelance photographers to quite the same degree. I have had no experience editing abroad but it seems to me, in talking to my confreres, that generally the answer is that which we have heard from Mr. Kummerfeld. It has to do with the society and the amount of litigation that goes on and the tendency to seek recourse.

Senator **DeConcini**. Thank you, gentlemen. Thank you very much for your testimony. We do sincerely look forward to working with you. There is some common ground here.

Mr. **Carter**. Thank you.

[Responses of panel members to supplemental questions by committee members, subsequently submitted for the record, follow:]

RESPONSES OF DONALD D. KUMMERFELD
TO SUPPLEMENTAL QUESTIONS OF SENATOR DECONCINI

1. You have said that the introduction of the Berne Concept of moral rights into American law would upset the balance and radically alter the American copyright system.

Given the fact that several of the Berne signatory nations have very different views of moral rights, could you explain how the American system would be adversely impacted by adherence to Berne even though the systems of other countries were not so affected when they joined? Hasn't the magazine industry survived, even flourished, in countries with moral rights?

1. Yes, the magazine industry has "survived" in "countries with moral rights". But "other countries" are not the United States of America.

I don't know how the legal systems of other countries reacted to adherence to Berne, but I do know that U.S. adherence, no matter what your implementing legislation finally says, will trigger a torrent of litigation in this country.

No other nation has a legal system as litigious, contentious, and combative as that of the United States. Adherence means recognition by Congress for the first time that a "moral right" or its equivalent exists somewhere in our law. Given the nature of our system, the meaning and scope of that "right", as with any other "right" contained in our law, will be shaped, tested, and refined in litigation forevermore.

As David Ladd's testimony makes clear, the preponderance of legal opinion and precedent is that there is no "moral right" in U.S. law. Adherence to Berne without adequate legislative protection will change that. A so-called "moral right", or its equivalent, will be added to the existing mix of rights which I have characterized as "balanced", and the "balance" will be no more. It will take years, if not decades, of litigation and additional legislative consideration to determine exactly what the "moral right" means in the American context.

The French legal system may be comfortable with "natural law" concepts such as "moral rights", but the notion of such rights existing outside the parameters of a contract is foreign to American jurisprudence. Our British common law brethren presently are having difficulty with the concept in the aftermath of their adherence to Berne, as Parliament debates moral rights legislation which will satisfy the perceived obligations of the Convention.

Let me conclude by reiterating the most important point of my testimony. Berne adherence will change a time-honored system that works and works to the benefit of everyone concerned -- publishers, editors, writers, photographers, and, most importantly, the American public. If it is the will of the Congress that the U.S. adhere to Berne, then, I respectfully submit, it is the obligation of the Congress to enact legislation which will minimize the disruption of that system and which will maintain our uniquely American "balance of rights".

2. Could you explain why there is a divergence of opinion on this issue of moral rights among publishers? Why would one group of publishers support adherence to Berne, while another opposes? Is this disagreement more a function of differing legal analyses or of different simply a function of differing legal views?

2. There is no divergence of opinion among magazine publishers. Let me state our position again: we do not oppose adherence if we are guaranteed by legislation that adherence will not change existing American law regarding so-called "moral rights".

As I said during my oral testimony, I recognize that there is a divergence of opinion with the book publishing industry. I cannot speak for them, but apparently some companies believe the advantages of Berne adherence outweigh the disadvantages. I wish to point out, however, as I did during my testimony, that three of the largest book publishers in the world -- Time Inc., McGraw-Hill, and Hearst -- find the balance weighed decisively against adherence absent protection from "moral rights".

With regard to newspaper publishers, I am not aware that they have taken a formal position as an industry. They may have other legislative priorities, but they should share our concerns. Indeed, one large newspaper publisher which has studied the issue and taken a position -- Hearst -- is against adherence in the absence of protection from "moral rights". Also, two members of the Coalition to Preserve the American Copyright Tradition -- Dow Jones and Times Mirror -- are among the world's largest newspaper publishers.

3. Do you have any specific examples of problems confronted by magazine publishers in countries with expansive moral rights?

Could some of these problems be avoided if a narrow and very carefully drawn moral rights provision were included in domestic copyright law? What is your opinion of some of the "horror stories" told by advocates of moral rights? [The colorization of The Maltese Falcon, the colorization of It's a Wonderful Life, the speeding up and cutting up of movies].

3. Permit me to answer each question in turn. (a) As I indicate in my answer to question #1 above, I'm not sure the experiences of other nations and other magazine industries are all that helpful in predicting the impact of "moral rights" on the United States. Given the unique nature of our society, our legal system, and our approach to dispute resolution, our experience will be unique -- and tumultuous.

One instructive example does leap immediately to mind, however -- an ongoing case in Brazil involving an MPA member, Time Inc. The issue there is the "moral right" of "paternity". In 1981, a Time Inc. publication, Life magazine, published a photograph which it took, under license, from video footage which appeared in a British television program. The British producers had obtained the footage from a Czechoslovakian film crew. Now, Time Inc. has been sued for damages in Brazil by a previously unknown person who claims that he is the creator of the original footage and that Life's failure to so identify him in the magazine is an infringement of his "moral right" of "paternity".

(b) With regard to the desirability of including a "narrow and very carefully drawn moral rights provision" in U.S. copyright law, we oppose any inclusion or recognition of "moral rights" in our copyright law. That is a purpose of the Hatch Amendment: to ensure that there is no such inclusion or recognition.

(c) With regard to any problems within the film industry, I have no expertise. I can only offer two observations.

First, it seems to me that the producers have adopted a high-risk strategy of pushing Berne adherence now, and worrying about "moral rights" later. The magazine industry is not willing to take that risk.

Second, I was intrigued at the hearing by the testimony of Messrs. Speilberg and Lucas. In response to questioning about their use in their films of the works of musical composers, they seemed to insist that they must have the right, as directors, to edit or abridge those works as they see fit. That seems to be precisely the point we are trying to make with regard to our need to edit our magazines!

4. In light of statements made by representatives of creators groups that they would seek strong moral rights protection through Berne implementation and elaboration, should we not be concerned that Berne would be a vehicle for greater moral rights protection?

In what way do you find that the present legislation, assuming that Congressman Kastenmeier's bill is changed, is deficient? It seems to me that adding the language that you support would be as much of a problem as adding language that the directors and others support? Wouldn't you really be better off with Berne protection and no change in current domestic copyright law as to moral rights?

4. Without a doubt, Berne adherence will be followed by strong efforts to "elaborate" on moral rights. That certainly is the British experience. We are willing to fight that battle when the time comes. All we ask, through the Hatch Amendment, is that, until the time does come, the playing field be kept level and moral rights proponents not be allowed to use the fact of adherence to "bootstrap" themselves into "moral rights" which do not now exist.

We vehemently oppose any effort to include explicit pro-"moral rights" language in the legislation. But we also believe strongly that unless the legislation does contain language such as that of the Hatch Amendment, the "moral rights" advocates will be able to argue that Berne adherence, in and of itself, has changed the status quo.

We commend Congressman Kastenmeier for producing a new bill in his recent mark-up session which takes a significant step toward dealing with the problem of preserving the status quo. But the language of the new bill still does not prevent "moral rights" proponents from using the courts to argue that the fact of adherence has expanded U. S. law by inference or implication. The Hatch Amendment would solve that problem.

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March 15, 1988

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents, Copyrights
and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator DeConcini:

The following are answers on behalf of the Coalition to Preserve the American Copyright Tradition to the questions contained in your March 8, 1988 letter. I also enclose a copy of testimony delivered last fall on behalf of the Coalition to the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice that you permitted to be added to the Senate record. Thank you for allowing the Coalition to present its views on this important issue. If the Coalition can provide any further assistance, please let us know.

> Question 1: In light of statements made by representatives of creators that they would seek strong moral rights protection through Berne implementation and elaboration, should we not be concerned that Berne would be a vehicle for greater moral rights protection?

Yes. The Coalition is greatly concerned that Berne adherence will provide a vehicle for the expansion of moral rights. Expansion is likely in related common law doctrines as a result of judicial "legislation" and in state and Federal statutes as a result of increased domestic and international pressure arising from adherence. While the members of the Coalition value and admire the creative endeavors of their contributors, they believe expansion of the moral right will upset the delicate balance that has developed through many years of experience.

There will be substantial pressure for the courts to expand the moral right (or equivalent doctrines) upon adherence. Any Congressional acceptance of the proposition that the moral right or its equivalent is already a part of U.S.

law would remove the restraints on judicial legislation afforded in the past by clear, consistent judicial rejection of the moral right. As one court rejecting a moral rights claim held, "[t]he conception of 'moral rights' . . . has not yet received acceptance in the law of the United States. . . . [w]hat plaintiff in reality seeks is a change in the law of this country to conform to that of certain other countries. . . . we are not disposed to make any new law in this respect."[1]

This pressure will be heightened as a result of the Report of the Ad Hoc Working Group,[2] which would likely be cited as a part of, or ancillary to, the legislative history of any Berne legislation that embodies the "minimalist" approach. Enactment of Berne-implementing legislation upon the premise of the Report's conclusion would be a Congressional invitation to further judicial expansion of the moral right (or its equivalent).

The Report is replete with discussion of projected expansion in common law doctrines relating to the moral right.[3] The point here, of course, is not whether the courts

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[1] Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947); See, e.g., Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813, 818 (N.Y. Sup. Ct. 1949) (quoting Vargas); Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 70-71, 80 N.Y.S.2d 575, 578-79 (N.Y. Sup. Ct. 1948) ("In the present state of our law the very existence of the right is not clear"), aff'd, 275 A.D. 692, 87 N.Y.S.2d 430 (1949); Geisel v. Poynter Products, Inc., 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968) ("the doctrine of moral right is not part of the law in the United States, except insofar as parts of that doctrine exist in our law as specific rights -- such as copyright, libel, privacy and unfair competition"); cf. Granz v. Harris, 198 F.2d 585, 590-91 (2d Cir. 1952) (declining to accept plaintiff's claim of moral rights violation, but granting relief on other grounds).

[2] Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Colum.-VLA J.L. & Arts (hereinafter the "Ad Hoc Report").

[3] For example, the Report characterizes Smith v. Montoro as holding that a failure to attribute authorship

(continued...)

would do what the Report suggests that they might do. The issue is that adherence to Berne, with no Federal statutory provision on moral rights, must imply that there is a moral right (or its equivalent) somewhere in American law; that upon the Report's analysis, it lies in large part in state statutory and decisional law; that since the courts have by interpretation of common law principles, or of state or federal statutes, created the right, they are free -- indeed encouraged -- to expand it. Notwithstanding the Congressional declaration that the Berne Convention is not self-executing, courts faced with moral rights claims will in close cases likely look for guidance to Berne and the laws of those nations that are far more familiar with the rights mandated by the Convention.[4]

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[3] (...continued)
"may constitute 'an implied reverse passing off' and thus violate Section 43(a) of the Lanham Act," Ad Hoc Report at 553 (emphasis added), citing Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981), and opines further that "[o]mission of an author's name . . . may constitute a willful prima facie tort," id. (emphasis added), and "publication under the author's name, with unauthorized changes, may violate his right of privacy or publicity." Id. at 555 (emphasis added).

On a crucial argument in the Ad Hoc Report's analysis, the Report declares that in a recent New York decision the court (not in a moral rights context) implied a contractual covenant of fair dealing, and that "it is likely that courts will apply the implied covenant of fair dealing or good faith to require identification of authors when there is a direct or indirect contractual nexus" -- "[g]iven the prevailing practice of attributing authorship, the public policy favoring it, the cataloging practices of libraries, the public interest in identifying authors of works, and the inherent unfairness of withholding recognition of paternity . . . ." Id. at 552 (emphasis added). These factors, the Report adds, "might lead courts to rules that the implied covenant of fair dealing required a user to identify the author of a work." Id. at 552 n.19 (emphasis added).

[4] See, e.g., Crimi, 89 N.Y.S.2d at 816-18, which looked to French cases and international commentators to give content to droit moral. As Professor Kernochan suggested in his testimony before the Senate during the last Congress,
(continued...)

Moreover, once the U.S. adheres to Berne, there will be domestic pressure to broaden the moral right upon the argument that expansion must be done to comply fully with the obligations of Berne membership. Testimony before the Congress already foreshadows such an effort. For example, the Directors Guild of America has testified before this Subcommittee that expansion of the moral right is necessary for the United States to meet its obligations under Berne. Professor Kernochan, a proponent of adherence and of the moral right, advocates adherence as a prelude to that objective: "Also important in my view is the pressure Berne adherence should put on us to raise the level of U.S. 'consciousness' about authors' needs and the level of protection we accord our own authors."[5] "I would think we should temper our solutions to maximize the chance of adherence. Once in Berne, then we can and should start the process of reexamining and rethinking the flaws in our own statute and mobilizing the forces necessary to do that right."[6] Similarly, the representative of three artists' organizations has stated

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[4] (...continued)
"[the Berne provisions] might not be wholly irrelevant in the resolution of ambiguities." U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 1st and 2d Sess. at 178 (1985 & 1986) (Memorandum of John M. Kernochan, Nash Professor of Law, Columbia University) [hereinafter "1985 & 1986 Senate Hearings"].

[5] 1985 & 1986 Senate Hearings at 167.

[6] Id. at 165. In response to Professor Kernochan's opinion that "we are sufficiently compatible, considering the pattern of other Berne countries, to join on the problem of moral rights," Senator Mathias replied with his now oft-quoted sally:

> Senator Mathias: It would be your advice to close your eyes, hold your nose and jump? Professor Kernochan: Yes, sir. [Laughter.] But I would not want to foreclose coming back at some later time as a part of a greater general effort to see what we can do about our own law.

Id. at 205.

that "after adhering to the Berne Convention we would be well-advised to study adopting an explicit codification of moral rights in our copyright law."[7]

The experience in the United Kingdom illustrates the danger that adherence to Berne will prompt proposals for changes in U.S. law. Now that the U.K. is considering adherence to the 1971 Paris text, to which the U.S. would be required to adhere, efforts are underway to change the law to explicitly recognize droit moral, and a draft bill has been debated in the House of Lords which includes such provisions. Similar efforts to effect such changes can be expected in U.S. law.

And once the United States is within Berne, there is likely to be substantial pressure from other members of Berne for changes in U.S. law. Professor Kernochan recognizes that "[w]ithout [a raising of U.S. consciousness for 'author's rights' following Berne adherence], other Berne countries might see our adherence as threatening their own hard won Berne gains for authors."[8]

> Question 2: In what way do you find that the present legislation, assuming that Congressman Kastenmeier's Bill is changed, is deficient? It seems to me that adding the language that you support would be as much of a problem as adding language that the directors and others support? Would you really be better off with Berne protection and no change in current domestic copyright law as to moral rights?

By present legislation, I assume that you are referring to the "minimalist" approach taken in the Administration Bill and the proposal recently marked up by Congressman Kastenmeier's House Judiciary Subcommittee. The Coalition's concerns with respect to the risks of expansion and elaboration of moral rights under the "minimalist" approach already have been discussed in our answer to the first question above.

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[7] Id. at 417 (Statement of Tad Crawford).

[8] Id. at 167.

The present proposed legislation does not meet these concerns. Nothing in that legislation will prevent the expansion of common law or state law doctrines that will result from the explicit recognition that, contrary to prior judicial decisions, the moral right is a part of U.S. law. Further, the legislation fails to establish that neither Berne nor the mere fact of Berne adherence may be used to justify future changes in the law. In short, the present legislation fails to accomplish the goal accepted by the sponsors of the legislation, maintenance of the status quo.

The Coalition believes that the amendment for consideration offered by Senator Hatch better secures the maintenance of the status quo by clarifying and strengthening the Congressional declarations and statement of intent under the minimalist approach, and by enacting, as positive law, a freeze of the present law "equivalent" of the moral right, using the federal preemption power. Rather than creating as much of a problem as adding language that the directors and others support, the Amendment would ensure that any future Congressional consideration of the moral rights issue will be on its own merits, free from pressures related to United States adherence to the Berne Convention.

> Question 3: Do you have any specific examples of problems confronted by magazine publishers in countries with expansive moral rights? Could some of these problems be avoided if a narrow and very carefully drawn moral rights provision were included in the domestic copyright law? What is your opinion of some of the "horror stories" told by advocates of moral rights? [The colorization of "The Maltese Falcon", the colorization of "It's A Wonderful Life", the speeding up and cutting up of movies].

Before citing specific examples, it should be noted that significant differences in history, culture and the author-publisher relationship exist between the United States and countries with expansive moral rights. First, magazine publishers in these countries have had over sixty years to adjust their business practices and relationships to meet their moral rights obligations under Berne. Second, these societies are far less litigious than our own and do not have a history of awarding huge damages for reputational torts.

This is not to suggest, however, that moral rights problems do not exist in these countries. They are, however, less likely to result in litigation or significant monetary remedies. For example, Time Inc. currently is defending a paternity rights case in Brazil. In that case, a Brazilian publisher published a photograph of Nazi war criminal Joseph Mengele. The publisher had obtained the photograph from Life magazine, where it originally appeared in 1981. The Life photo had been taken, with full license, from video footage used in a television program produced in England. The footage in question had been obtained from a Czech film crew. The English producer had advised Life that the Czech film crew did not wish credit for use of the photo. The plaintiff in Brazil, previously unknown to Life, claims that he took the film footage and is demanding unspecified damages for the failure to provide credit.

Magazine publishers in Berne states must also be sensitive to situations where an author may object to the context in which a work is placed as "a derogatory action in relation to" the work. Though raised in connection with a motion picture, Shostakovich v. Twentieth Century-Fox Film Corp.[9] has serious implications for the publishing industries as well. There, four Soviet composers objected to the use of their public domain works in what they considered an anti-Soviet motion picture. The court refused to grant relief, in part, on the ground that "[i]n the present state of our law, the very existence of the [moral] right is not clear."[10] In contrast, a French court, hearing the same facts, did find a violation of the moral right and ordered the film seized.[11] If the moral right were introduced into U.S. law, such context claims -- even, as in Shostakovich, with public domain works -- might well be recognized.

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[9] 196 Misc. 67, 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948), aff'd, 275 A.D. 692, 87 N.Y.S.2d 430 (1949).

[10] Id., 80 N.Y.S.2d at 579.

[11] Societe Le Chant du Monde v. Societe Fox Europe and Societe Fox Americaine Twentieth Century, Cour d'appel, Paris, Jan. 13, 1953, D.A. 1954, 16, 80, discussed in Strauss, The Moral Right of the Author, 4 Am. J. Comp. L. 506, 534-35 n.56 (1955). The New York court thus was correct in its assertion that droit moral could conceivably "prevent the use of a composition or work, in the public domain." Shostakovich, 80 N.Y.S.2d at 578.

Context claims greatly amplify uncertainty in publishing. With them, a photographer or graphic artist would be able to object to the subject matter of the text with which his photograph or drawing is associated or juxtaposed, or an author may be able to object to the presence of other authors or articles on disfavored subjects in the publication.

With respect to the "horror stories" suggested by moral rights advocates, it is appropriate first to express admiration for the contributions to our heritage made by motion picture directors and screenwriters. Further, there is a recognizable desire of these creators to preserve prints in the form originally intended. At the same time, copyright owners who risk tens of millions of dollars to support these creative activities and who mobilize the myriad creative talents to produce motion pictures should have full opportunity to recoup their investment and garner profits necessary to support the further creation of motion pictures, and to that end, adapt completed motion pictures for various media.

> Question 4: Could you explain why there is a divergence of opinion on this issue of moral rights among publishers? Why would one group of publishers support adherence to Berne, while another opposes? Is this disagreement more a function of different legal analyses or simply a function of differing legal views?

First, it should be noted that there is no divergence of opinion on the moral right, in any respect, among magazine publishers. Whatever divergence exists is among book publishers.

Second, there is no divergence of opinion among even book publishers concerning the dangers inherent in the expansion and elaboration of the moral right in the United States. The divergence among book publishers on the issue of the moral right concerns only the respective analyses of whether United States adherence to the Berne Convention under the approach taken in the present Congressional proposals necessarily will lead to such expansion and elaboration. Here, it is difficult to assess the extent of their analysis of the issue since their submissions to Congress to date have not been supported by such analysis.

The divergence of views on adherence to Berne appears to be based on different appraisals of the value of the benefits and burdens of adherence. Several book publishers with large international interests belong to CPACT and oppose Berne. Others have supported Berne. Since those different conclusions are drawn from essentially the same facts and circumstances, it appears that some publishers value the symbolic importance of adherence to Berne more than the members of the Coalition.

> Question 5: In your written testimony you state that Berne will not noticeably increase the level of protection afforded to U.S. works abroad because of front door protection available through the Universal Copyright Convention and backdoor protection available through simultaneous publication provisions of Berne.
>
> But, hasn't our ability to use the U.C.C. been diminished since the U.S. withdrew from UNESCO, and how would you respond to testimony from witnesses that simultaneous publication is complicated, expensive, and only marginally effective?

United States withdrawal from UNESCO has not diminished U.S. participation or leadership in the U.C.C. Withdrawal has had only the marginal effect of eliminating our direct input in the UNESCO program budgetary process. It has neither affected our rights and obligations under the U.C.C. nor those of other U.C.C. members with respect to the United States. Nor has it impaired our ability to participate in international copyright deliberations under the U.C.C., which routinely are held as joint UNESCO-WIPO meetings under both the U.C.C. and the Berne Convention.

With respect to backdoor protection, the members of the Coalition include some of this country's largest international book and magazine companies and, accordingly, are sensitive to arguments that simultaneous publication may be complicated, expensive and marginally effective. At the same time, however, the benefits of Berne adherence in this connection have been overstated. First, the list of those Berne countries which are not members of the U.C.C. or a bilateral with the U.S. -- and where only the Berne back door is available -- reveals not one major U.S. trading partner: Benin, Burkina Faso, Central African Republic, Chad, Congo, Cyprus, Egypt, Gabon, Ivory Coast, Libya, Madagascar, Mali, Mauritania, Niger, Rwanda, Suriname, Thailand, Togo, Turkey, Uruguay, Zaire. Interestingly, several of these Berne states are international piracy centers.

Second, the threat of a Berne member closing the back door only applies in the countries just listed, since national treatment under the U.C.C. -- the "front door" -- is required independently of Berne in the Berne-U.C.C. member states. Among the countries in which the United States receives "front door" protection are Argentina, Australia, Belgium, Canada, Chile, Costa Rica, Finland, France, Federal Republic of Germany, Greece, India, Ireland, Israel, Italy, Japan, Mexico, the Netherlands, Norway, Philippines, Portugal, Spain, Sweden, Switzerland, the United Kingdom and Venezuela.

Third, the quality of protection copyright owners receive in non-U.C.C. Berne countries is open to question. Thailand, for example, currently is a member of the 1908 Berlin text of Berne. Despite its Berne membership, Thailand is a center of piracy -- so much so that in July, 1987, the President initiated an investigation of Thailand's copyright practices under the GSP annual review measures. Thus, the United States, by joining Berne, can enjoy the same level of piracy "that other Berne members now enjoy," including the United Kingdom, a Berne member, which also has complained about piracy in Thailand.

Bearing in mind that backdoor protection must be relied upon only in these countries, members of the Coalition, like other copyright owners, have employed the practice of simultaneous publication and have not found it as burdensome as some proponents of adherence have suggested. While a few examples of the burdens have been presented, no comprehensive assessments have been. Until this legislation came before the Congress, the burdens or hazards of simultaneous publication were not much discussed. In any event, the Coalition regards the gains from eliminating the practice of simultaneous publication in those few states not a party to the U.C.C. as outweighed by the prospects of expanded moral rights in U.S. law.

> Question 6: The Subcommittee has received testimony that one court has ruled that backdoor protection was not sufficient because it was intended to merely be a way to get Berne protection without complying with the requirements of Berne? Doesn't this decision indicate that other countries are beginning to see the artificial mechanism we have adopted?

I assume that this question refers to the recent episode in Thailand in which a Thai Court denied protection for Earthquake and The Sting based on the failure to effectuate simultaneous publication. Having not read the decision, I cannot comment on whether it also addressed the back door as being "merely a way to get Berne protection without complying with the requirements of Berne." However, even if this were the case, it is incorrect to view backdoor protection as an "artificial mechanism we have adopted." Rather, it is a mechanism incorporated within the text of the Berne Convention itself. There is nothing "artificial" about it. Moreover, even if other countries did view backdoor protection as an artificial mechanism, the threat of a Berne member closing the back door only applies in those twenty-one non-U.C.C. member states of Berne identified in response to Question 5.

> Question 7: We have heard from numerous copyright experts, Ralph Oman, Barbara Ringer, Chairman Kastenmeier and those from the Administration that 1) we need not expand moral rights in this country in order to comply with Berne, and 2) that if either the Leahy Bill, Hatch Bill or a bill with comparable language is enacted, that there will be no expansion of moral rights in the U.S. by the courts. Do you agree with these experts?

The issue is not whether we need to expand moral rights in this country in order to comply with Berne. Rather, it is whether there will be an expansion of moral rights in the United States as a consequence of our adherence. In this regard and as detailed in the answers to the first and second questions above, the Coalition does not believe that we can accept the conclusion that "there will be no expansion of moral rights in the U.S. by the courts." The Hatch Amendment is intended to ensure that that does not happen.

Question 8: Why do we need the amendment proposed yesterday by Senator Hatch if the legislation as constructed will make no changes in current law?

As detailed in my answers to the first and second questions above, it is the view of the Coalition that the legislation as constructed will likely lead to further expansion and elaboration of moral rights. The mere fact of adherence, without the provisions proposed by Senator Hatch, would effect a profound change in U.S. law.

Question 9: For those of us whose preference is not to address the issue of moral rights at all in the context of Berne legislation, wouldn't we want to oppose the Hatch Amendment as going too far in the other direction.

No. The underlying purpose of the Hatch Amendment is to preserve the status quo so that the issue of moral rights is not addressed within the context of Berne legislation. Rather than "going too far", the Amendment retains a level playing field until and unless Congress considers the issue further.

The Coalition hopes that these responses to your questions will be helpful to your Subcommittee and will be pleased to answer any further questions you may have.

Respectfully yours,

David Ladd

David Ladd

Senator DeConcini. We now will proceed to the last panel, Mr. George Lucas, Mr. Bo Goldman, and Mr. Steven Spielberg, if they would come forward, please. We have a little less than an hour remaining, so I would ask that the witnesses restrain their statements to 5 minutes so we can go to questions. Their full statements will be inserted in the record. We will start with Mr. Lucas, as soon as he is ready.

STATEMENT OF GEORGE LUCAS, CHAIRMAN OF THE BOARD, LUCASFILM, LTD.

Mr. Lucas. Thank you, Mr. Chairman, Senators.

My name is George Lucas. I am a writer, director, and producer of motion pictures and chairman of the board of Lucasfilm, Ltd., a multifaceted entertainment corporation. I am not here today as a writer, director, or producer or as the chairman of a corporation. I have come as a citizen of what I believe to be a great society that is in need of a moral anchor to help define and protect its intellectual and cultural heritage. It is not being protected.

The destruction of our film heritage, which is the focus of our concern here, is only the tip of the iceberg. American law does not protect our painters, sculptors, recording artists, authors or filmmakers from having their life work distorted and their reputations ruined. If something is not done now to clearly state the moral rights of artists, current and future technology will alter, mutilate and destroy for future generations the subtle human truths and higher human feelings that talented individuals within our society have created.

This Nation needs a simple moral anchor regarding art and artists. That anchor has been provided for in article 6 bis, the moral rights clause of the Berne treaty. It has worked for many years in many different countries. It is simple. Under article 6 bis, an artist would have the right to object to the defacement of his work. Intellectual properties, products of the mind, creative expression and imagination, are human qualities. They are part of the very essence of what it is to be human.

These current defacements are just the beginning. Today, engineers with their computers can add color to black-and-white movies, change the soundtrack, speed up the pace, and add or subtract material to the philosophical taste of the copyright holder. Tomorrow more advanced technologies will be able to replace actors with "fresher faces" or alter dialog and change the movement of the actors' lips to match.

I am the chairman of a corporation that produces motion pictures. I also hold the copyrights on several of those pictures. The Berne treaty is absolutely necessary to protect the copyright owner, especially from international piracy.

Why do I advocate moral rights for artists when others claim it will destroy the industry? First of all, I feel that a lot of this consternation about litigation toppling the industry, toppling the publishing industry, is not as extreme as everybody thinks. The Berne treaty has worked in a lot of other countries and I think it can work here, too. I think this Nation is old enough and mature enough to deal with this situation.

Creative talent is a precious resource. It is limited. It needs to be nourished. It needs to be replenished. Artists need a sense that the work that they are doing is meaningful and that what they are doing will last, complete with all the subtle nuances they have struggled so hard to achieve.

As a producer, I do not see how the moral rights proposal, as it exists from the Directors Guild, will affect the actual production of motion pictures any more than it will affect the production of magazines or anything else. Motion pictures are built on the writer's foundation. All of the creative people involved—the cameramen, the actors, and everybody—then look to the director for guidance, and they trust the director and his vision. That is the vision that we are trying to protect.

The money spent to alter established works could be better spent to support and develop new talent, to make new color movies. American artists are a national treasure, similar to our forests and our wildlife. We must exploit these resources wisely.

Filmmakers have continued to work for me over the years at lower rates than they could get from larger corporations, because I respect their talent and have an understanding of the creative process. I haven't once heard any of the corporate representatives here today say that they respect the creative minds on which their companies depend, and that is all we are asking for, just a little respect for the mind, the human mind behind the computer, the book, the film, the painting.

The corporations who hold many of the copyrights are unstable entities. They are bought and sold, and corporate officers change on a regular basis. There is nothing to stop American films, records, books, and paintings from being sold to a foreign entity or an egotistical gangster, and having them change our cultural heritage to suit their own personal taste.

There are those who say American law is sufficient. That is an outrage. It is not sufficient. If it were sufficient, why would I be here? Why would John Huston have been so studiously ignored when he protested the colorization of "The Maltese Falcon"? Why have films been cut up and butchered? Where can the artists go to protest? What is the law? Where is the law that says that John Huston can sue or get redress for what he feels was an abomination of his work?

You can't split intellectual properties into two parts, and deal with properties now and deal with the intellectual, the mind, our humanness, at some later date. Vandalizing a work of art and then putting a disclaimer on it saying that this is not what the artist originally intended is not sufficient. Excluding some artists from moral rights protection because they were commissioned to create a work is not sufficient.

Is an artist who works for hire any less of an artist? Is the Sistine Chapel any less of a work or art and unworthy of protection because Michelangelo worked for hire?

Attention should be paid to this question of our soul, not simply to accounting procedures. Attention should be paid to the interests of those who are yet unborn, the children and the grandchildren of the children that are in this room today. They should be able to see this generation as it saw itself, and the past generation as it saw itself, in all the arts.

The other arts have not been hit quite as hard as film, but who is to say that one day it may not be profitable to alter paintings, literature, or a recording artist's performance. A clear statement of our national values must be made now. Are we going to be a society totally controlled by greed and profit?

You make the laws, and the laws represent an awareness of a higher moral order. Law by greed denies our humanness. I hope you have the courage to lead America in acknowledging to the human race the importance of American art, and according the proper protection for the creators of that art, as it is accorded to them in much of the rest of the world communities.

Thank you.

[The prepared statement of Mr. Lucas follows:]

LUCASFILM
Ltd

George Lucas Statement

Senate Hearing On Berne Treaty

My name is George Lucas. I am a writer, director, and producer of motion pictures and Chairman of the Board of Lucasfilm Ltd., a multi-faceted entertainment corporation.

I am not here today as a writer-director, or as a producer, or as the chairman of a corporation. I've come as a citizen of what I believe to be a great society that is in need of a moral anchor to help define and protect its intellectual and cultural heritage. It is not being protected.

The destruction of our film heritage, which is the focus of concern today, is only the tip of the iceberg. American law does not protect our painters, sculptors, recording artists, authors, or filmmakers from having their lifework distorted, and their reputation ruined. If something is not done now to clearly state the moral rights of artists, current and future technologies will alter, mutilate, and destroy for future generations the subtle human truths and highest human feeling that talented individuals within our society have created.

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A copyright is held in trust by its owner until it ultimately reverts to the public domain. American works of art belong to the American public; they are part of our cultural history. For over fifty years in seventy-six nations, with the notable exception of the United States and Russia, the arbitrator of the artistic disposition of a work of art has been the creator or creators of that work. Who better, than the person whose hard labor and unique talent created the art, to determine what is an appropriate alteration.

Buying a copyright does not make one an artist. The copyright owner does not suddenly become talented and creative, does not suddenly have the ability to write a novel, play music, paint pictures or make films. An artist's creative talent is not something that can be transferred. And it is the artist's unique vision that must be respected, that must be protected.

This nation needs a simple moral anchor regarding art and artists. That anchor has been provided for in Article 6 bis, the moral rights clause of the Berne Treaty. It has worked for many years in many different countries. It is simple: Under 6 bis, an artist would have the right to object to the defacement of his work. Any legislation short of this is a patchwork which will confuse, and continue to need re-patching.

Creative expression and imagination are human qualities, they are part of the very essence of what it is to be human.

People who alter or destroy works of art and our cultural heritage for profit or as an exercise of power are barbarians, and if the laws of the United States continue to condone this behavior, history will surely classify us as a barbaric society. The preservation of our cultural heritage may not seem to be as politically sensitive an issue as "when life begins" or "when it should be appropriately terminated," but it is as important because it goes to the heart of what sets mankind apart. Creative expression is at the core of our humanness. Art is a distinctly human endeavor. We must have respect for it if we are to have any respect for the human race.

These current defacements are just the beginning. Today, engineers with their computers can add color to black-and-white movies, change the soundtrack, speed up the pace, and add or subtract material to the philosophical taste of the copyright holder. Tomorrow, more advanced technology will be able to replace actors with "fresher faces," or alter dialogue and change the movement of the actor's lips to match. It will soon be possible to create a new "original" negative with whatever changes or alterations the copyright holder of the moment desires. The copyright holders, so far, have not been completely diligent in preserving the original negatives of films they control. In order to reconstruct old negatives, many archivists have had to go to Eastern bloc countries where American films have been better preserved.

In the future it will become even easier for old negatives to become lost and be "replaced" by new altered negatives. This would be a great loss to our society. Our cultural history must not be allowed to be rewritten.

Bertrand Tavernier, President of the French Society of Film Directors, has said that his first introduction to the United States was through American films of the 30's and 40's. He saw "Mr. Smith Goes to Washington" and applauded the reply to a cynical senator, who thought Mr. Smith's idealistic venture would fail, that it was a "lost cause." "Lost causes," replied James Stewart as Mr. Smith, "are the only kind worth fighting for." Tavernier saw and understood that perseverance and morality could persuade the Senate. American films encouraged Tavernier to become a filmmaker.

Now, "Much to your shame," he says, "America has become a garbage dump for films." What law will stop this? There is none.

I am the chairman of a corporation that produces motion pictures. The Berne Treaty is necessary to protect the motion picture industry and the recording industry from international piracy. This is just good business. Why do I advocate moral rights for artists when others claim it will destroy the industry? Supporting the moral rights clause is good business. The creators of an artistic work that will eventually be exploited are the core of the motion picture industry. Creative talent is a precious resource. It is limited, it needs to be nourished, and it needs to be replenished. Artists need a sense that the work they are doing is meaningful and that what they are doing will last, complete with all the subtle nuances they have struggled so hard to achieve.

The money spent to alter established works could be better spent to support and develop new talent. American artists are a national treasure similar to our forests, our wildlife, and other natural resources. It is good business to exploit these resources wisely. If one doesn't, one will eventually be out of business, with our resources squandered for quarterly profits and lost for future generations. Providing the best possible product is good business.

My company is extremely successful because I believe in creating quality entertainment. The marketplace responds to quality and I have built my company on this idea. Flooding the marketplace with shoddy inferior products ultimately hurts business. Filmmakers have continued to work for me over the years at lower rates than they could get working for the larger corporations because I respect their talent and have an understanding of the creative process.

The corporations, who hold many of the copyrights, are unstable entities. They are bought and sold, and corporate officers change on a regular basis. There is nothing to stop American films, records, books, and paintings from being sold to a foreign entity or egotistical gangsters and having them change our cultural heritage to suit their personal taste.

I accuse the companies and groups, who say that American law is sufficient, of misleading the Congress and the People for their own economic self-interest. The law is not sufficient.

I accuse the Motion Picture Association of seeking to save one billion dollars in film piracy, without acknowledging the moral rights of the artists who created these films as required by the Berne Treaty.

I accuse the corporations, who oppose the moral rights of the artist, of being dishonest and insensitive to American cultural heritage and of being interested only in their quarterly bottom line, and not in the long-term interest of the Nation.

The public's interest is ultimately dominant over all other interests. And the proof of that is that even a copyright law only permits the creators and their estate a limited amount of time to enjoy the economic fruits of that work.

There are those who say American law is sufficient. That's an outrage! It's not sufficient! If it were sufficient, why would I be here? Why would John Houston have been so studiously ignored when he protested the colorization of "The Maltese Falcon?" Why are films cut up and butchered? Where can an artist go to protest?

Vandalizing a work of art and then putting a disclaimer on it saying this was not what the artist originally intended is not sufficient. Excluding some artists from moral rights protection because they were commissioned to create a work is not sufficient.

Is an artist who works for hire any less of an artist? Is the Sistine Chapel ceiling any less a work of art, and unworthy of protection, because Michelangelo worked for hire?

It has been suggested that the problem of the defacement of our films could be solved legally by removing the credit of the director and the writer. I ask, "What about the production designer, the cinematographer, the editor and the others who contributed to that central artistic vision?" And the answer comes back, "Well, we will remove their credits too; that way no one gets hurt." No one, that is, except the poor actors who are left on the screen, pinned like helpless butterflies as their faces are recolored, their wardrobe redesigned, their timing thrown off, their entrances and exits truncated and their characterizations shorn of critical dialogue.

Attention should be paid to this question of our soul, and not simply to accounting procedures. Attention should be paid to the interest of those who are yet unborn, who should be able to see this generation as it saw itself, and the past generation as it saw itself.

The other arts have not been hit quite as hard as film. But who is to say that, one day, it may also be profitable to alter paintings, literature, or a recording artist's performance. A clear statement of our national values must be made now. Are we going to be a society totally controlled by greed and profit? You make the laws, and the laws represent an awareness of a higher moral order. Law by greed denies our humanness.

I hope you have the courage to lead America in acknowledging the importance of American art to the human race, and accord the proper protection for the creators of that art -- as it is accorded them in much of the rest of the world communities.

LUCASFILM Ltd

GEORGE LUCAS BIOGRAPHY

George Lucas is the creator of the phenomenally successful "Star Wars" saga. The epic film adventures--"Star Wars," "The Empire Strikes Back" and "Return Of The Jedi."

Lucas was born in Modesto, California, where he attended Modesto Junior College before enrolling in the University of Southern California (USC) film school. As a student at USC, Lucas made several short films including "THX-1138" which took first prize at the 1967-68 National Student Film Festival. In 1967, Warner Bros. awarded him a scholarship to observe the filming of "Finian's Rainbow," directed by Francis Coppola. The following year, Lucas worked as Coppola's assistant on "The Rain People" and made a short film entitled "Filmmaker" about the directing of the movie.

Lucas and Coppola shared a common vision. They dreamed of starting an independent film production company where a community of writers, producers, and directors could share ideas. In 1969, the two filmmakers moved to Northern California where Coppola founded American Zoetrope. The company's first project was Lucas' full-length version of "THX-1138."

In 1973, Lucas co-wrote and directed "American Graffiti." The film was extremely successful and won the

Golden Globe, the New York Film Critics and National Society of Film Critics awards, and received five Academy Award nominations.

Four years later, Lucas wrote and directed "Star Wars"--a film which broke all box office records and won seven Academy Awards. The film not only brought audiences back to the theater but also opened new frontiers for technicians. Lucas established Industrial Light and Magic (ILM) and Sprocket Systems to create the special effects and sound design for "Star Wars." The ILM team introduced computer technology to the film industry and revolutionized special effects. Ben Burtt of Sprocket Systems brought new dimensions to sound design as he created voices for aliens, creatures, and droids.

Lucas went on to write the stories for "The Empire Strikes Back" and "Return Of The Jedi" which he also executive produced. In 1980, he was the executive producer and co-writer of "Raiders Of The Lost Ark," directed by Steven Spielberg, which won five Academy Awards. He was also the co-executive producer and creator of the story, "Indiana Jones And The Temple Of Doom," released in 1984.

For the next few years, Lucas concentrated on completing the building of Skywalker Ranch and developing individual divisions within Lucasfilm Ltd. The Ranch houses Lucasfilm's pre- and post-production facilities. The company includes film production, animation, computer games, licensing, THX and TAP, special effects, and post-production divisions.

Within the past year, Lucas served as executive producer for Disneyland's 3-D musical space adventure, "Captain EO," and creator of Disneyland's most popular attraction, STAR TOURS. "Captain EO," directed by Francis Coppola and starring Michael Jackson, is shown in a theater uniquely designed for the 17-minute spectacular. Lucas, Industrial Light and Magic, and Disney designed the theater as part of the show and produced a visual, aural, and environmental experience unique in the 3-D medium.

Lucas, Industrial Light and Magic and Sprockets also collaborated with the Disney Imagineers to create Disneyland's newest attraction, STAR TOURS. Lucas combined technology with creativity to produce a new realm of entertainment.

George Lucas is currently the executive producer for two Lucasfilm productions. "Willow," based on a story by George Lucas and directed by Ron Howard, is an adventure-fantasy that takes place a long time ago in a mythical land. "Tucker: A Man And His Dream," directed by Francis Coppola and starring Jeff Bridges, is the story of Preston Tucker--an innovative car designer who dreamed of creating the car of the future.

Senator **DeConcini**. Thank you, Mr. Lucas.
Mr. Goldman.

STATEMENT OF BO GOLDMAN ON BEHALF OF THE WRITERS GUILD OF AMERICA

Mr. **Goldman**. Mr. Chairman, copyright is the life's blood of an artist. You hear from magazines and publishers, studios and producers, software owners and pharmaceutical proprietors, but how ironic that you hear from so few of us you wish to protect.

Respected members of the Subcommittee on Patents, Copyrights and Trademarks, art is neither a patent, a copyright, or a trademark. Art is the soul of a nation. Art is the substance without which, other than bread, man cannot live. Art is a Grandma Moses or a Jackson Pollack, a Bob Dylan song or a Jerome Robbins ballet, a Tennessee Williams play or a movie from Francis Coppola. Art is that which we cannot eat or drink but which can, like our faith, sustain us in our darkest moments, enhance our daily lives, celebrate our tiny but intense victories.

How can you legislate art? It is like quicksilver. It can't be shaped or hammered into some form to serve one generation and then be dismembered to serve another. It's like taking a baby and saying, "This arm is no longer any good. It's not the kind of arm that is in fashion now. Let's take an arm from that baby over there, and how about that leg? Is the head right? Fix the nose, change the figure, take a tuck here and a nip there. Now we have a saleable baby, but it bears little resemblance to the baby that was born. So what? We can sell more of them."

Respected members of the subcommittee, I do not envy you your job: the hours of droning testimony, the tedium of marking up a bill and then marking it up all over again, the lobbyists, the press, the enemies and, God knows, the friends, the compromise of family life, the long flights back to the constituency on the weekend, and then the long flight back after to make sure you are here to cast your vote on some issue on which your convictions are not clear but your intuition and your heart fairly shouts at you what to do.

Why do you do it? The New York Times may love you and the big newspaper back home may hate you. Dan Rather may snarl at you, but then again he may smile on you. And do you, like me, ever look in the mirror and say, "What in the hell am I doing this for?" Politics, like art, is not an easy dollar. And I may be on dangerous ground if I offer, you do this, just as I do what I do, because you cannot do anything else as well. It is a calling, a sometimes distant and distorted one, to be sure, but nonetheless it speaks to you.

How would you like your words changed? How would you like your face tinted? How would you like the substance of what you say altered or compressed, truncated, or bowdlerized to suit what a publisher may deem the fashion of a later generation? Why should it be "four score and 20 years ago," why not just 100 years ago? It is much easier to remember, simpler to digest and besides, the man who wrote the phrase isn't around to complain about it.

Our movies belong to us, like our house and our land. They are dear and indefinable, like our wives and our children. They are as unique as a fingerprint, and sometimes as dangerous and stunning as an earthquake. "The Grapes of Wrath" of Ford and Steinbeck tells us more about the Depression than a college of economics, and "The Godfather" of Coppola and Puzo provides more insight into the criminal mind than all of the files of the FBI.

Phrases like "cultural heritage" confound me. I feel as if I were studying for a high school exam. I do know this. I want my children and their children to see my movies the way they were written. When the Indian finally speaks in "One Flew Over The Cuckoo's Nest," I want him to say "Juicy Fruit" and not "diet bubble gum." On the long shot of the ward, I want to see the old hallucinator dancing in the back, and on the pan I don't want it to stop before it reaches the poor, lobotomized soul behind the cage.

In "Melvin and Howard" you could take out the first and last reels of the movie, excise Jason Robards completely, forget about Howard Hughes. Call the movie Melvin and it will play fairly well as a country western. I want my children to see it the way it was written. I want their children to do the same. I want their friends and their parents, their communities and their cities, I want to world to see the movie in the color, in the shape, with the words and the texture it was conceived because, simply enough, that is the best way.

Democracy is the last and best hope of mankind. It is great for mankind but terrible for art. A movie is not written by committee. It is not shot by consensus. It starts with one man or woman alone in a room and then the director, despite the hordes around him, is alone on the stage. There is collaboration at every step, but the decision a costumer makes to sew a sequin here or a bow there, a cameraman to jell this window or not, an editor to go to the long shot from the closeup or the closeup from the long shot, every artist ultimately makes the decision, and it is a lonely one, forged by years of experience, the pain of trial and error, but made with the deepest of emotions.

These movies are who we are, who we have been, who we will be. These movies are the litany of our existence and the food of our souls. They are absentminded laughter and they are unconscious tears. You can't change them any more than you can change the wart on Lincoln's face. They are sometimes not pretty, they are sometimes dispensable, but a thousand years from now they will still be us.

What are the mechanics for this, you might ask. Forty-five years ago my father sat before a Senate subcommittee with a plan to fight inflation. Compulsory savings, it was called, and my father took the long train ride home, clutching the hot acetate of his appearance. We gathered around to listen and heard Senator Taft, or was it Vandenberg, say, "What are the mechanics for this, Mr. Goldman?" And I thought, all 10 years of me, "They've got him. What is he going to say?" And I promptly fell asleep as he intoned his reply.

My answer to how to implement moral rights is simply, "If you want to do it, you will do it." If politics is the art of the possible, then art is the science of the impossible. You will find a way, give teeth to the dry, dusty phrases of the Berne Convention, not a very sexy issue, as the news magazines would say, but crucial to how this country is perceived.

Movies are who we are. Don't fool with us, not in the name of money or progress or arrogance. Remember the first time you went with your parents to "Snow White," with your girl to "Singin' in the Rain," with your children to "ET." You have the right to see it that way and only that way forever, and that is the way it was made.

Thank you, Mr. Chairman. It was indeed an honor.

[The prepared statement of Mr. Goldman follows:]

Statement of Bo Goldman
on behalf of the Writers Guild of America

Respected Members of the Subcommittee on Patents, Copyrights and Trademarks.

Mr. Chairman, copyright is the life's blood of an artist. You will hear from magazines and publishers, studios and producers, software owners and pharmaceutical proprietors, but how ironic you will hear from so few of us you wish to protect.

Art is neither a patent, a copyright or a trademark. Art is the soul of a nation. Art is the substance without which, other than bread, man cannot live. Art is a Grandma Moses or a Jackson Pollack, a Bob Dylan song or a Jerome Robbins ballet, a Tennessee Williams play or a movie by Francis Coppola. Art is that which we cannot eat or drink but which can, like our faith, sustain us in our darkest moments, enhance our daily lives, celebrate our tiny, but intense victories.

How can you legislate art? It is like quicksilver, it can't be shaped or hammered into some form to serve one generation, and then dismembered to serve another. It is like taking a baby and saying this arm's no longer any good, it's not the kind of arm that's in fashion now, let's take an arm from that baby over there, and how about that leg, is the head right? Bob the nose, implant the breasts, take a tuck here and a nip there, now we have a saleable baby. But it bears no resemblance to the baby that was born. So what? We can sell more of them.

Respected members of the subcommittee, I do not envy you your job. The hours of droning testimony, the tedium of marking-up a bill and then marking it up all over again, the lobbyists, the press, the enemies, and God knows, the friends, the compromise of family life, the long flights back to the constituency on the weekend and then the long flight back after to make sure you are here to cast your vote on some issue on which your convictions are not clear, but your intuition and your heart fairly shouts at you what to do. Why do you do it? The New York Times may love you and the big newspaper back home may hate you, Dan Rather may snarl at you, but then again he may smile on you and do you, like me, ever look in the mirror in the morning and say "What in the hell am I doing this for?" Politics, like art, is not an easy dollar. And I may be on dangerous ground if I offer, you do this just as I do what I do, because you cannot do anything else as well. It is a calling, a sometimes distant and distorted one to be sure, but nonetheless it speaks to you.

How would you like your words changed? How would you like your face tinted? How would you like the substance of what you say altered or compressed, truncated or bowdlerized, to suit what a publisher may deem the fashion of a later generation? Why should it be "four score and twenty years ago," why not just a hundred years ago, it's much easier to remember, simpler to digest and besides, the man who wrote the phrase isn't around to complain about it?

Our movies belong to us. Like our house and our land. They are dear and indefinable like our wives and our children. They are as unique as a fingerprint and sometimes as dangerous and stunning as an earthquake. John Ford's "The Grapes of Wrath" tells us more about the depression than a college of economics, and Coppola's "The Godfather" provides more insight into the criminal mind than all the files of the FBI.

Phrases like "cultural heritage" confound me. I feel as if I were studying for a high school exam. I do know this - I want my children and their children to see my movies the way they were written. When the Indian finally speaks in "One Flew Over The Cuckoo's Nest" I want him to say "Juicy Fruit" and not Diet Bubble Gum. On the long shot of the ward, I want to see the old hallucinator dancing in the back, and on the pan, I don't want it to stop before it reaches the poor lobotomized soul behind the cage. In "Melvin and Howard," you could take out the first and last reels of the movies, excise Jason Robards completely, forget about Howard Hughes, call the movie "Melvin" and it will play fairly well as a country western. I want my children to see it the way it was written, I want their children to do the same, I want their friends and their parents, their communities and their cities, I want the world to see the movie in the color, in the shape, with the words and the texture it was conceived because simply enough, that is the best way.

Democracy is the last and best hope of mankind. It's great for mankind but terrible for art. A movie is not written by committee, is not shot by consensus, it starts with one man or woman along in a room, and then the director, despite the hordes around him, is alone on the stage, there is collaboration at every step but the decision a costumer makes to sew a sequin here or a bow there, a cameraman to jell this window or not, an editor to go to the long shot from the closeup or the closeup from the long shot, every artist ultimately makes the decision and it is a lonely one - forged by years of experience, the pain of trial and error, and made with the deepest of emotions. These movies are who we are. Who we have been. Who we will be. These movies are the litany of our existence, and the food of our souls. They are absent-minded laughter, and they are unconscious tears. You can't change them any more than you change the wart on Lincoln's face. They are sometimes not pretty, they are sometimes dispensable, but a thousand years from now, they will still be us.

"What are the mechanics for this?" you might ask. Forty-five years ago, my father sat before a senate subcommittee with a plan to fight inflation. Compulsory savings it was called, and my father took the long trainride home, clutching the hot acetate of his appearance, we gathered around to listen and heard Senator Taft or was it Vandenberg say "What are the mechanics for his, Mr. Goldman?" and I thought, all ten years of me, they've got him, what's he going to say, and I promptly fell asleep as he intoned his reply. My answer to him to do this is simply: "If you want to do it, you'll do it." If politics is the art of the possible, then art is the science of the impossible. You'll find a way, implement the dry, dusty phrases of the Berne Convention, not a very sexy issue as the newsmagazines would say, but crucial to how this country is perceived.

Movies are who we are. Don't fool with us. Not in the name of money or progress or arrogance. Remember the first time you went with your parents to "Snow White." With your girl to "Singin' In The Rain." With your children to "E.T." You have the right to see it that way and only that way forever. And that's the way it was made.

Writers Guild of America, west, Inc.
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BO GOLDMAN is a native of New York City. He attended Princeton University and, at 24, had his first play produced on Broadway. Titled "First Impressions," it was a musical version of "Pride and Prejudice," with words by Bo Goldman, book by Abe Burrows and music by Glenn Paxton.

During the early 60s, Goldman worked in television, writing and producing teleplays for CBS' "Seven Lively Arts"--on which he collaborated with such emerging directors as George Roy Hill and Sidney Lumet. He also associate produced and wrote a number of programs for "Playhouse 90," all the while struggling to get a second play mounted on Broadway.

Goldman's first screenwriting effort, "Shoot the Moon," took ten years to make it into theaters. One of the many people to read the script during that time was director Milos Forman, who didn't want to make the film but instead asked Goldman to do a re-write of a project that Forman was about to direct. The resulting effort, "One Flew Over the Cuckoo's Nest," was a tremendous success and remains to this day only the second film in Academy history to win Best Picture, Direction, Actor, Actress and Screenplay.

Since that time, Goldman has had several original scripts produced: "Melvin and Howard," which won him a second writing Oscar, and the much-traveled "Shoot the Moon," which was directed by Alan Parker and starred Diane Keaton and Albert Finney. Goldman's other screen credit is "The Rose."

Journalist David Chute once wrote: "Goldman's flair for lifelike dialogue and behavioral details--an organic impression of ongoing life--has won him an enviable reputation and a solid sideline as a 'fixer' of troubled films."

Goldman lives in Northern California with his wife of 34 years, Mab, and is the father of six children.

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FILMOGRAPHY

One Flew Over the Cuckoo's Nest (1975).....Screenplay by Laurence Hauben and Bo Goldman, from the novel by Ken Kesey

The Rose (1979).................Screenplay by Bo Goldman and Bill Kerby, story by Bill Kerby

Melvin and Howard (1980)........Screenplay by Bo Goldman

Shoot the Moon (1982)...........Screenplay by Bo Goldman

Senator DECONCINI. Thank you, Mr. Goldman.

Mr. Spielberg.

STATEMENT OF STEVEN SPIELBERG ON BEHALF OF THE DIRECTORS GUILD OF AMERICA, ACCOMPANIED BY ELLIOT SILVERSTEIN

Mr. SPIELBERG. Thank you, Mr. Chairman.

My name is Steven Spielberg, and I am a director and producer of motion pictures. I am here today on my own behalf and on the behalf of 8,500 fellow members of the Directors Guild of America. Sitting with me to my right is Elliot Silverstein, who is also a director and chairman of the committee at the Directors Guild charged with the pursuit of our moral rights cause. He will also be available for any questions you might have.

It is 1812 and British soldiers have captured some American paintings and prints and taken them to Halifax, Nova Scotia. A suit has been brought over this action and filed with the British authorities. A British Admiralty Justice has heard the case and as part of his judgment has given the following warning:

> The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as a peculium of this or that nation, but as the property of mankind at large and as belonging to the common interests of the whole species.

Those paintings and prints were ordered released to the Pennsylvania Academy of Fine Arts. That justice understood what so many of our adversaries in this hearing and in the congressional hearings which preceded it do not understand: that art claims a special status among civilized nations. Artistic endeavor is, in fact, the expression of the soul of the human species, and we are here today to discuss the disposition of a small but important piece of the soul of America, its art, more specifically its motion pictures, perhaps our Nation's foremost ambassadors to the world.

The Berne treaty, Mr. Chairman, gives voice to this idea that art and the artist are not commodities to be treated like sausage. The Berne treaty gives to the artist a specific standing to object to a defacement of his or her work, and it recognizes moral rights as distinct from economic rights. That distinction is at the heart of the debate surrounding the Berne treaty issue.

As you know, in order to sign the treaty a country must have a moral rights concept in its domestic law, sufficiently clear to comply with the requirements of the treaty. Our adversaries maintain that United States law is sufficient to qualify for Berne membership and no further recognition need be given to the moral rights of its artists. No film fantasy is as outlandish or as blatant as that claim.

Under what law is the work of film artists, for instance, protected? Where is the law that defines their moral rights? What law gave Frank Capra moral rights to object to the colorization of "It's A Wonderful Life"? What law gave John Houston legal support to seek redress for his disgust at a similar act of defacement performed on "The Maltese Falcon"? What law protects those of our colleagues, living and dead, whose honor and reputation are offended by the electronic speeding up or slowing down of their films or the capricious editing of scenes done in order to fit films into arbitrary television time slots?—a curse, by the way, not visited on sports events, which proves the networks can be flexible when they want to be.

If some think the Lanham Act protects us, they are wrong. In order to comply with its warnings about misrepresentations, a film defacer would merely have to put up a disclaimer before the film was projected, stating that it has done this or that to that film. The Lanham Act does not protect the film, it does not protect the artists. It protects the consumer, and does not in any way bestow the credentials on the United States which are clearly required by the Berne treaty.

We request that you rebalance the competing interests of "show" and "business" after the employee/employer period is over and all the deadlines have been met. We urge that Berne implementing legislation contain our proposal that without the agreement or permission of the two artistic authors—the principal director and principal screen writer—no material alterations may be made in a film following its first paid public exhibition after previous trial runs and festivals. We further propose that the Congress limit the reward for the agreement between artist authors to $1.

There are those that say the marketplace enjoys this defacement. They want to see black-and-white films in pastel colors. They want to see it going faster or slower. They will tolerate any disfigurement. Mr. Chairman, this is one of the most ticklish answers I have to offer in this chamber this morning, but I think it must be said: that the creation of art is not a democratic process, and in the very tyranny of its defined vision lies its value to the Nation.

The public has no right to vote on whether a black-and-white film is to be colored, any more than it has the right to vote on how the scene should be written, whether the camera should favor the actor or actress, whether it should move or remain fixed, or on any of the thousands of other artistic choices made by the artist in the turbulent process of creation. The public does have the right to reject or accept the result but not to participate in its creation.

My good friend Mr. Jack Valenti, who represents the Motion Picture Association of America, has said that the motion picture companies lose $1 billion a year to film pirates, and he seeks the Berne treaty protection, and in that we wish him well. However, it is ironic, Mr. Chairman, that he proposes that the United States use the same tactics as the pirates, who refuse to pay the price for what they are using. He proposes that the United States sneak past the box office without paying for the ticket. He proposes that the MPAA get all the economic protection of Berne without paying the price it requires—moral rights.

Mr. Chairman, let not the United States attempt to gain something for nothing. Let us not stand accused by other Berne nations of sleazy behavior, or let us not attempt to sneak past the box office. Let us honorably pay the price of Berne and serve the future, and let generations yet unborn seen the films produced by our film artists as they were released, not in some distorted form designed by an engineer or a Master of Business Administration, a lawyer, an accountant, a marketeer, an executive, or some other nonartist who, while not claiming an individual right of paternity, does not step into the light and take the discredit for what has been done to our films; who rather hides in the dark, behind the corporate shield.

In the interest of fair play and honor among the civilized nations of the world, we ask the Senate to stand up and perform an act of political courage: to resist the economic powers which insist that you serve them and not us; to recognize the moral principle involved here as of greater importance to our national self-esteem than another buck on the bottom line; to grant that Berne requires moral rights in American law that do not now exist.

Finally, Mr. Chairman, the business community makes the bizarre claim that the grant of moral rights will result in lawsuits and the clogging of the court system. First let me say that there is a strong self-policing component in our proposal. If a director or a writer does not agree to an alteration of a finished film which is desired by the financier, it is highly likely he or she will not be employed by that financier again; but he or she will have a choice and there will be a balancing of interests.

Second, if our courts are clogged at present in this country, it is because the citizens demand rights given to them by the Constitution and the law, and that is a healthy thing, critical to the functioning of a democracy. You should be aware that in France, at least, we have been told that there has only been one moral rights case brought to court in 50 years.

Third, since in order to object the artist would have to go to court, he or she would have to spend a lot of money, and who would have the deeper pockets, the individual or the corporation? The artist would have to care very much about the disposition of the work, but the artist would have a choice and there would be a balancing of interests.

We ask nothing for ourselves. We ask everything for the future. Certainly, Mr. Chairman, there must be some part of the great tapestry of American political, economic, and cultural life so influenced by the Congress of the United States, where value shall survive price. Thank you.

[Material submitted by Mr. Spielberg follows:]

DIRECTORS GUILD OF AMERICA

Statement of Steven Spielberg

My name is Steven Spielberg, and I am a director and producer of motion pictures. I am here today on my own behalf and on behalf of my 8,500 fellow members of the Directors Guild of America. I have submitted a written statement on behalf of the Directors Guild of America. Sitting with me is Elliot Silverstein, also a director, and Chairman of the Committee at the Directors Guild, charged with the pursuit of our moral rights goals. He will also be available for any questions you may have.

And now, if I may, I would like to make a brief oral statement.

It is 1812 and British soldiers have captured some American paintings and prints and taken them to Halifax, Nova Scotia. A suit has been brought over this action and filed with the British authorities. A British Admiralty Justice has heard the case and as part of his judgment has given the following warning:

> The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as

> the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.

The paintings and prints were ordered released to the Pennsylvania Academy of Fine Arts. That justice understood what so many of our adversaries in this hearing and in the Congressional hearings which preceded it, do not understand; that art claims a special status among civilized nations. Artistic endeavor is, in fact, the expression of the soul of the human species and we are here today to discuss the disposition of a small but important piece of the soul of America - its art; specifically, its motion pictures.

The Congress levies taxes on the citizens of our country in order to nourish and define our way of life. The President and the Congress require military service in times of emergency to protect it. Surely it is not simply our political system that we seek to protect and nurture, but the way of life - the special culture that the American political system permits and encourages. Certainly one component of our national culture is its art which provides so many ornaments and insights to our daily lives. And one of the arts is certainly our motion pictures - perhaps our nation's foremost ambassadors to the world. So, in a very real sense the nation, which has paid the price for its culture, has an investment in the preservation of what it has paid for and what it has been called upon to occasionally protect in war - that way of life, its benefits and products which we leave to our children.

The Berne Treaty, Mr. Chairman, gives voice to this idea that art and the artist are not commodities to be treated like sausage. The Berne Treaty gives to the artist a specific standing to object to a defacement of his/her work and it recognizes moral rights as distinct from economic rights. That distinction is at the heart of the debate surrounding the Berne Treaty issue.

As you know, in order to sign the treaty, a country must have a moral rights concept in its domestic law, sufficiently clear to comply with the requirements of the treaty. Our adversaries maintain that United States law is sufficient to qualify for Berne membership and no further recognition need be given to the moral rights of its artists. No film fantasy is as outlandish or as blatant as that claim. Under what law is the work of film artists, for instance, protected? Where is the law that defines their moral rights? What law gave Frank Capra moral rights to object to the colorization of "Its A Wonderful Life"? What law gave John Huston legal support to seek redress for his disgust at a similar act of defacement performed on "The Maltese Falcon"? What law will protect our dead colleagues from eternal embarrassment at the hands of corporate defacers? What law protects those of our colleagues, living and dead, whose honor and reputation are offended by the electronic speeding up or slowing down of their films or the capricious editing of scenes, done in order to fit the films into arbitrary time slots (a curse not visited on sports events - which proves that the networks can be flexible with their time slots if they want to be)? What law protects against the offense to honor and reputation of our foreign colleagues whose films undergo similar humiliations when they are exhibited in the United States? What law will stop this? There is none.

If our adversaries think the Lanham Act protects us, they are wrong. In order to comply with its warnings about misrepresentations, a film defaced would merely have to put up a disclaimer before the film is projected, stating that it has been colorized, that it has been electronically shortened, that scenes have been edited out for time, that the composition has been changed, etc. The Lanham Act does not protect the film, it does not protect the artists. It protects the consumer and does not in any way bestow the credentials on the United States which are clearly required by the Berne Treaty.

How did this magical notion arrive that something is there that isn't there? The business community has gathered together and in a massive and cynical act of self service, they have invented it - without any basis in fact. They have performed this reverse intellectual somersault in order to rationalize their insensitive and untenable position; namely, that what is good for the business community is good for the U.S.A. Of course, they are partially right but not wholly right. A community of artists also lives, has a voice and also contributes to the national health and welfare. We request that you rebalance the competing interests of "show" and "business" after the employer/employee period is over and deadlines have been met. We urge that Berne implementing legislation contain our proposal that, without the agreement and permission of the two artistic authors (the principal director and principal screenwriter), no material alterations may be made in a film following its first, paid, public, exhibition after previews, trial runs and festivals.

We further propose that the Congress limit the reward for the agreement between artistic authors to $1.00. We also propose that no requirement to grant permission be included in an employment contract. As you know, the motion picture companies stand the original copyright thesis on its head by requiring that the artistic authors give up any moral rights or copyrights to the financing corporation. If they refuse, they don't work; it is all neat and simple. So far, Goliath has had all the chances of battle. Article 6 bis of the Berne Treaty is the stone for David and David will not give it up lest the future look back and find its own cultural history in disarray.

There are those that say "the market place enjoys this defacement, they want to see black and white films in pastel colors, they want to see it faster or slower, they will tolerate any disfigurement, etc." Mr. Chairman, this is one of the most ticklish answers I have to offer in this chamber this morning, but it must be said: The creation of art is not a democratic process and in the very tyranny of its defined vision lies its value to the nation. The public has no right to vote on whether a black and white film is to be colored anymore than it has the right to vote on how the scenes should be written, whether the camera should favor the actor or actress, whether it should move or remain fixed, whether the next angle should be a close up or a wide shot, or on any of the thousands of other artistic choices made by the artist in the turbulent process of creation. The public does have a right to accept or reject the result, but not to participate in its creation.

My good friend, Mr. Jack Valenti, who represents the Motion Picture Association of America, has said that the motion picture companies lose 1 billion dollars a year to film pirates. He seeks the Berne Treaty protection and in that we wish him well. However, it is ironic Mr. Chairman, that he proposes that the United States use the same tactics as the pirates who refuse to pay the price for what they are using. He proposes that the United States sneak by the box office without paying for the ticket. He proposes that the MPAA get all the economic protection of Berne without paying the price it requires - moral rights! Mr. Chairman, let not the United States attempt to gain something for nothing. Let us not stand accused by the other Berne nations of sleazy behavior. Let us not attempt to "sneak past the box office." Let us honorably pay the price of Berne and serve the future. Let generations yet unborn see the films produced by our film artists as they were released, not in some distorted form designed by an engineer, a master of business administration, a lawyer, an agent, an accountant, a marketeer, an executive, or some other non-artist who, not claiming an individual right of paternity, does not step into the light and take the discredit for what has been done to our film, but rather hides safely, in the dark - invisible, behind the corporate shield.

In the interest of fair play and honor among the civilized nations of the world, we ask the senate to stand up and perform an act of political courage; to resist the economic powers which insist that you serve them only and not us; to recognize the moral principle involved here as of greater importance to our national self-esteem than another buck on the bottomline; to grant that Berne requires moral rights in American law that do not now exist.

The Senate must serve future generations which it represents here today and not merely the present, limited, economic interests of corporations which have sufficient power already.

Finally, Mr. Chairman, the business community makes a bizarre claim that the grant of moral rights will result in lawsuits and the clogging of the court system. First, let me say that there is a strong self policing component in our proposal. If a director or writer do not agree to an alteration of a finished film which is desired by the financier, it is highly likely he/she will not be employed by that financier again. But he/she will have a choice! And there will be a balancing of interests. Secondly, if our courts are clogged at present in this country, it is because the citizens demand rights given to them by the Constitution and the law. That is a healthy thing, critical to the functioning of a democracy. Would the corporations demand a removal of the First Amendment from the Constitution in order to clear court dockets of First Amendment problems? You should be aware that in France, at least, we have been told that there has only been one moral rights case brought to court in fifty years. Thirdly, since in order to object, the artist would have to go to court, he/she would have to spend a lot of money (and who would have the deeper pockets, the individual or the corporation?). The artist would have to care very much about the disposition of the work. But the artist would have a choice! And there would be a balancing of interests.

We ask nothing for ourselves, we ask everything for the future. Surely, Mr. Chairman, there must be some part of the great tapestry of American political, economic and cultural life, so influenced by the Congress of the United States, where value shall survive price!

Thank you, Mr. Chairman.

DIRECTORS GUILD OF AMERICA

STEVEN SPIELBERG

Biography

After more than a decade of moviemaking, Steven Spielberg has emerged as one of the film world's most respected and successful talents. He has directed and/or produced seven of the top 20 grossing films of all time.

In recognition of his consistent exellence in filmmaking, he received the prestigious Irving G. Thalberg Award at the 1987 Academy Award ceremonies.

"Empire of the Sun" is the first film he has directed since "The Color Purple" which received eleven Academy Award nominations and earned him the coveted Directors Guild of America Award. "The Color Purple" was produced by Spielberg, Kathleen Kennedy, Frank Marshall, and Quincy Jones. For "Empire of the Sun" he has again been nominated by the Directors Guild of America.

Born in Cincinnati and raised in Phoenix, Spielberg made his first film at the age of 13. While a student at California State Long Beach, he made his first 35mm short film, "Amblin," which so impressed Universal Studios they put the young filmmaker under contract.

Following his award-winning television movie, "Duel" (which later found great success in European theatrical release). Spielberg directed his first feature film, "The Sugarland Express." His next two films, "Jaws" and "Close Encounters of the Third Kind" were phenomenally successful and were nominated for multiple Academy Awards.

Following his big-scale comedy "1941," he teamed with long-time friend George Lucas to make "Raiders of the Lost Ark" which he directed and Lucas produced. It was that year's top grossing film and recipient of five Academy Awards.

In 1982, the filmmaker co-wrote and co-produced the thriller "Poltergeist" while concurrently directing "E.T. The Extra-Terrestrial," the number one box office success of all time.

After directing one segment of "Twilight Zone - The Movie" which he co-produced, Spielberg once again teamed up with George Lucas on "Indiana Jones and the Temple of Doom."

Spielberg formed his production company, Amblin Entertainment, in 1984 and has since gone on to executive produce, with Kathleen Kennedy and Frank Marshall, "Gremlins," "The Goonies," "Back To The Future," "Young Sherlock Holmes," "The Money Pit," "An American Tail," "Innerspace" and "Batteries Not Included."

Currently in post-production is "Who Framed Roger Rabbit?," directed by Robert Zemeckis scheduled for a summer 1988 release by Disney. He is currently in pre-production on the third "Indiana Jones" film for a start this spring. Also in production for Universal is "Land Before Time" which is being presented by George Lucas and Steven Spielberg.

In addition to developing a number of varied projects for future production, Spielberg was executive producer of the network anthology series "Amazing Stories," for which he directed two episodes.

Statement of the Directors Guild of America

Mr. Chairman, we are very pleased to have the opportunity to appear before the subcommittee today as it reviews Berne implementing legislation.

The Directors Guild of America is a labor organization representing America's working film directors. Throughout its history, the Guild has fought not only for economic rights but also for protection of the artistic integrity of the work of film directors. Similarly, the Berne Treaty advancement is the economic and artistic rights of copyright leaders and artists. Or so we understand the words of the Treaty. But judging from the tone of the hearings, from the preponderance of testimony from proprietors, from the backhanded treatment given moral rights and artists, it is clear concern is centered totally on advancing the economic interests of intellectual property industries. Artists are the orphans in the storm.

Today's hearing illustrates the point. One panelist after another represents either an industry or a proprietary point of view. One panel, our panel, has moral rights as its cause. If we include the Mathias hearings, there have been 10 days of testimony on Berne legislation featuring a parade of witnesses from business or government agencies whose responsibilities are to advance business interests. Seven artists will have testified; were it not for the Directors Guild of America and our companions at the Writers Guild, only two artists would have appeared, Garson Kanin and William Smith. This is a sad fact, leading to unwarranted implications. It is outrageous in its unfairness.

But such is the arithmetic in testimony concerning the Berne Convention for the Protection of Literary and Artistic Works. We ought to change the title, since it appears we have a case of misrepresentation, to the Berne Convention for the Advancement of Proprietary Interests. Reviewing the hearing record, one might conclude that corporations are creators and artists. Ridiculous! People create!

In April of 1986, Sen. Mathias completed his second day of hearings on the Berne Treaty. He had this exchange with Tad Crawford of the Graphic Artists Guild.

Sen. Mathias.	But Berne itself has been the subject of discussion among graphic artists?
Mr. Crawford.	Mainly the issue of the moral rights provision of Berne, and also the general enhancement that would flow from that kind of international protection.
Sen. Mathias.	The reason I press you on this a little bit is because we ought to hear more from creators of copyrighted works. Creators of copyrighted works are very often individualists. Being creative individuals, they do not always tend to be organized.

Sen. Mathias' wish should have been prophetic; more artists ought to have been heard from in the course of this debate precisely because Berne was not mislabelled, and because Berne is rich with other standards and concerns besides those relating to economic interest. Surely the lineage of the literary conferences of the 1860's, 70's and 80's, which gave rise to Berne, is not the profit sheet of proprietors. If that were the case, there would be no point to a number of revisions throughout the course of the convention adopted specifically in recognition of the impact of technology on art forms and authors. How would one account, then, for the 1908 rewrite Berlin that addresses the need to protect authors rights vis-a-vis photography and the emerging art of cinema? How would one account for the provisions relating to "moral rights," arguably the last great conceptual addition to the Treaty?

Article 6bis enshrines in dignity the labor of artists. And it does so at a point in time, 1928, in which it is clear that technology is contributing to the birth of new art forms and new methods of distribution. Sixty years ago in that new fangled world of technology-based art forms, it was the creative person that the Berne nations went out of their way to recognize as remaining at the center of creative endeavor.

We are at another time when technology is advancing so rapidly that accepted concepts of authorship, ownership, infringement, distribution, etc. may require radical rethinking in our copyright laws. Every advance of technology is a double-edged sword; there is the promise of new and startling fresh artistic visions; there is the possibility that old or new artistic products will be altered or mutilated or stolen by punching a keyboard. What is constant is the contribution of the artist.

Copyright laws, our own and those of other countries, are designed to nurture creative effort, and our Constitution provides for an economic incentive to encourage the advance of the arts and sciences. But as Frank Pierson noted in his testimony in September "for the serious artist and author economic incentive is not the issue. ... These people of genius create out of an inner drive beyond the reach of economic incentive; the economic benefit of copyright merely frees them to do what the Constitution says it wants them to do."

Berne does not merely present an opportunity to recognize through moral rights the intrinsic value of artists and their works, it imposes an obligation to do so. Berne compliance without moral rights is not merely an empty gesture, it is insufficient.

This may well be the final hearing on what is widely regarded as the most important piece of copyright legislation analyzed by Congress since the 1976 rewrite. Clearly, becoming a part of Berne has its rewards. The U.S. would assume its rightful leadership role in international copyright counsels. The nagging and proper charge that the U.S. seeks higher standards of protection for its own copyrighted works but not for those of other countries would be put to rest. At a stroke, the ratification of Berne would eliminate the need, and the time and money involved, in securing backdoor protection. Enormous progress can be made in curtailing the piracy of American intellectual property, with all of its implications for fairer trade and trade imbalances.

Great accomplishments, to be sure. But what is historic about Berne is what we regard as the heart of the treaty, its moral rights. For the first time ever in the deliberations of Congress, it is possible for the United States to recognize in an unambiguous way the rights of artists. More than that, the adoption of moral rights as a part of the Berne Treaty would add to the Constitutional element of economic incentive a clear message that the work of artists is intrinsically valuable. Individual artists and their work would be given, as Berne says they deserve, a decent measure of respect and protection.

The problem in this sophisticated, technological century, Mr. Chairman, is that artistic creations and endeavors are frequently not those of single authors. Motion pictures and publishing, for instance, are enormous industries that have grown up in order to develop and deliver the products of creative endeavor to the marketplace. But who is the creator in such a case?

American copyright law has viewed the world through the lens of property rights, economic incentive, risk capital. So in the case of motion pictures, copyright has been vested with the financier. In the case of publishing, copyright is most often vested in the book or magazine company. But, of course, financiers don't write books or make motion pictures.

This debate over the Berne Treaty has been dominated and controlled by proprietary interests. The dangerous imbalance of power that permeates the relationship of creators with those who buy their talent and sell their work has permeated the debate in Congress. Very politely, with the full dimensions of legal sophistry, these interests are quite simply trying to retain in the Berne legislation the same kind of control over artists as they retain in the ordinary course of doing business.

We believe this debate was prejudiced from the point at which the self-appointed Ad Hoc Committee was convened. Here you have a group of twelve private interests, supposedly disinterested, merely analyzing the impediments in U.S. law that need correction for the U.S. to join the Berne Convention. But on this copyright jury, only two of its members could reasonably claim to represent only constituencies of artists. There were no artists. This was not a dispassionate copyright tribunal -- it was a cheering section for big business.

It wasn't any surprise that such a group should decide that the contentious point in the upcoming debate, moral rights, was, after all, "irrelevant" to passage. If there were moral rights, the floodgates of litigation would open, magazines would not be able to publish, the movie industry would collapse, and the world would stop turning on its axis. Moral rights had to be trivialized and disposed of, rationalized into irrelevance through the claim that U.S. law already provides for the moral rights of Berne. This cynical ploy grows out of the political calculus that the proprietors would not grant an inch more authority or respect to the artists they employ or the works they create. It's Berne or moral rights, but not both.

There are many important issues in the Berne Treaty, but surely the most challenging one is moral rights: that is, moral rights breaks new ground in U.S. copyright law by bringing a new conceptual framework of rights to bear on the side of authors. American law is organic and can absorb new concepts. American ideas of fair play can move beyond where they are now. And American ideas of what is in the public interest can be further articulated. But following the debate in Congress, one might guess that moral rights is either a minor matter in the text of the Treaty or merely an inconvenient impediment to U.S. adherence. It is neither. Nor do moral rights signal, like a death-knell, the demise of America's copyright industries.

Virtually all previous witnesses arguing for U.S. entry into the Berne Convention have contended that present U.S. law meets the minimum standards of moral rights required by Berne. These witnesses say the Lanham Act is sufficient, or that U.S. case law points the way, or that state statutes will protect the author should he or she be aggrieved regarding the rights of paternity and integrity.

This is nonsense, and our opponents know it. The Lanham Act is insufficient to meet the goals of Berne, as are state statutes. And while case law might evolve toward greater protection for artists, that claim is largely speculative. In fact, the weight of cases runs in the opposite direction. Even the case most often mentioned, Gilliam v ABC, the Monty Python program, has not spawned case law progeny to protect against artistic mutilations.

Those who oppose moral rights -- but who nevertheless want to see the U.S. ratify the Berne Treaty -- have devised the "chicken little" theory. According to this theory, artists and creators, who have heretofore conducted amicable relations with buyers, syndicators, licensors and publishers, will suddenly condemn in court every cropped photograph, every edited work. The system by which artistic products are marketed and sold will be thrown into chaos.

However, countries where national legislation provide for artists rights have not had their court dockets inundated with moral rights cases, or their intellectual property industries collapse, as our opponents contend would happen. France, a country known for the most developed national legislation regarding the protection of artists, has maintained high artistic quality without sacrifice of its business or judicial systems. Of course, experiences vary from country to country, and France or other countries in Europe cannot serve as perfect models for the litigious United States, but their experience under moral rights tends to refute the anxiety-ridden claims of our opponents. Moreover, it is not entrepreneurs alone that rely on the developed systems of publishing, marketing, licensing, reproducing, and syndicating artistic materials. Artists rely on these systems, too.

Film directors for whom I speak, like other artists, view this moral rights debate as a question of cultural honesty. We beseech the Congress to insure that the works we created, that have been published and that bear our name, are maintained in that fashion - unless we agree to change them. This is at the heart of the rights of paternity and integrity, the moral rights explicitly set forth in the Berne Treaty. Our goal is made more urgent today because motion pictures are being offered to the public as the original version when, in fact, significant alterations have been made.

The most publicized of these changes is colorization of original black and white films, but it is not the only one. Movies can be electronically compressed in time by having their footage speeded up, and by this process, the director's choices about the pace and the visual rhythm of the film, an essential artistic element, are co-opted by technicians. Through panning-and-scanning, visual images are compressed from a wide screen to a much smaller television format, and in the process a technician must arbitrarily edit out visual materials he deems unimportant or irrelevant.

The computer coloring of black and white films, which has jeopardized America's film heritage, galvanized the Directors Guild to protest. American film masterpieces, that had been shown for years in their original black and white, are being altered and then exhibited or sold to mass markets. Fundamental, creative decisions designed to enhance the dramatic effect of black and white movie making are being colored over. In Orwellian fashion, the machines revise film history, trampling upon the honor and reputation of the great directors who created those works. To us, this issue crystallizes the moral rights debate, and offers the specter of a director's reputation being damaged in the eyes of future generations.

Obviously, the director's grievance is not with technology - movies are an art form based in 20th century technology. Our grievance is with those who purposefully change motion pictures from what they were when they were released for exhibition without the consent of the primary artistic authors of the film. The technology available to these people is moving at such a pace that the entire archive of American film is under threat.

This is the point where our concerns merge with other creators, such as those in the fine arts, whose works may also be defaced. And this is the point where it becomes powerfully clear that explicit legal protection is required to insure that art works are not arbitrarily altered contrary to aesthetic intent.

We recognize, however, that moral rights raise concerns of the producing companies, and perhaps some of these fears can be put to rest. Our interest is seeing to it that the finished work, the released motion picture, is protected:

(1) "Moral rights" would entail no changes whatsoever in the production phase of movie-making. To insure this, we recommend that statutory language be crafted to clarify that moral rights would obtain only after theatrical release, the first paid, public exhibitions of a film following previews, trial runs, and festivals, all of which provide input leading to the final release version of the film.

(2) "Moral rights" would be alienable. This is in accord with traditional American contract law. Some of my colleagues, who have made film in black and white, have stated they would have no objection to their work being colored by a computer. Others would. The choice should rest with the film's creative authors - the principal director and screenwriter.

(3) The Guild seeks no alteration of the traditional employer/employee relationship that is characteristic of relations between producers and directors. As far as copyright ownership, the work-for-hire doctrine should remain expressly in tact. Moral rights, not economic rights, would be provided the principal director and principal screenwriter.

(4) To emphasize that our concern is for the integrity of the artists work and not for any economic reward offered for granting permission to alter a film after release, we propose that the Congress limit any compensation for such permission to $1.

Mr. Chairman, we understand that explicit moral rights language may break some new legal ground based on legal theory more fully developed in Europe. But Berne presupposes that artists and creators are not ordinary entrepreneurs and that their contributions should not be regarded solely as a matter of commercial concern. This is precisely what is distinctive about Berne and its moral rights provisions.

Those contending U.S. law is currently sufficient in providing artists with protection are really saying that artists should not be given these rights. They seek the benefits of the Treaty, but do not accept its obligations. The windfall to the motion picture companies alone would be enormous, but there would be no price for them to pay. We believe the United States should place itself in the role of a leader on the moral rights issue, and not "squeak by," to borrow Professor Kernochan's phrase. How could it possibly be leadership, Mr. Chairman, to adopt this particular treaty but, in the process, disregard the moral heart of Berne?

Mr. Chairman, explicit recognition of an artist's moral rights is long overdue in the United States. We are a country rightly proud of its creativity and ingenuity. Our artists are in the world's front rank, the groundbreakers in their fields. America's artists deserve the decent respect that explicit moral rights language would bestow, and the Treaty provides us this opportunity. We believe that the spirit of the Treaty requires this from America.

Senator DECONCINI. Mr. Spielberg, thank you.

I want the record to show that Mr. Silverstein is also with the panel. Mr. Silverstein, do you want to submit a statement? Because of time, we have to move on.

Mr. SILVERSTEIN. No, sir. I am just available to amplify any questions that you may have.

Senator DECONCINI. We are very glad to have you here.

Mr. Lucas, as a producer you have worked mostly, if not exclusively, with stories that you yourself have written. However, most producers acquire works that have been written as books. What do you think should be the proper relationship between authors, books and producers of movies based on those books? Should an author have a final say over how such a movie should actually be made? Should a songwriter be able to control how a song is used in the movie?

Mr. LUCAS. What I believe is, when an author says, "It's OK for you to make a movie out of my book," that author has given his permission to do whatever is necessary to make that book into a movie, and the same thing goes for recording artists and that sort of thing. The nature of film art is that the director is the creative force behind it, taking a lot of different creative elements and putting them together into a new form.

At least the songwriter and the author have a choice to say, "I don't want you to make a movie out of my book," or "I want you to." It is going to be quite a while before anybody is able to make a movie out of "Catcher in the Rye."

Senator DECONCINI. Well, did you get permission, for instance, from the artists whose songs you used in "American Graffiti," to use only portions of the songs?

Mr. LUCAS. I got permission to use the songs.

Senator DECONCINI. The songs?

Mr. LUCAS. Yes.

Senator DECONCINI. Well, doesn't the same argument work, that that songwriter ought to be able to say to you, you know, "You use it only the way I want you to use it." Aren't you saying the same thing to someone who maybe buys your movie, that "You can only use it the way I want it used."

Mr. LUCAS. Well, they are getting permission.

Senator DECONCINI. What is the difference? I guess that is really what I am trying to find out.

Mr. LUCAS. The difference is that if somebody asks me, "Could I colorize your movie?" then I have a choice of saying yes or no to that. If——

Senator DECONCINI. Well, if a songwriter—just to carry that a little further—if a songwriter says, "You can use my song," but he says, "I don't want you to shorten it," then what would you do?

Mr. LUCAS. Then I would say, "OK, I won't use the song." I actually had that happen in "American Graffiti." Several people wanted us to use the entire song, and I said, "I can't do that," and so we didn't use that song.

Senator DECONCINI. So you didn't use the song?

Mr. LUCAS. Yes. There is a choice there. I have a choice of using it and they have a choice of selling it to me, and it's a marketplace.

Senator DECONCINI. But when they sell it, they sell it all to you. Is that correct?

Mr. LUCAS. Yes.

Senator DECONCINI. And that means you can do whatever you want with it?

Mr. LUCAS. Right.

Senator DECONCINI. Have you ever given moral rights by contract to a director of a film that you have produced? Do you contract in that area?

Mr. LUCAS. Again—no, I haven't given that in a contract.

Senator DECONCINI. Is that normally not done?

Mr. LUCAS. Standard industry procedure is to take all the rights.

Senator DECONCINI. Yourself. Thank you.

Mr. Goldman, you wrote the screenplay, "One Flew Over the Cuckoo's Nest," as you mentioned. Under your version of moral rights, would Ken Kesey have the right to object to changes you made in the original story as you adapted it for the movie screen?

Mr. GOLDMAN. No, because he sold the rights to the producers, and he had the choice not to——

Senator DECONCINI. Sell them.

Mr. GOLDMAN. In fact——

Senator DECONCINI. And when you bought them, you had the right to do whatever you——

Mr. GOLDMAN. I didn't buy them, sir.

Senator DECONCINI. Well, whoever bought them had the right to do whatever they wanted to with them.

Mr. GOLDMAN. Well, yes, they would have that choice. In fact, Ken Kesey wrote a screenplay. I believe there were nine screenplays of "One Flew Over the Cuckoo's Nest" previous to mine. Kesey wrote one which was rejected. He could have tried to buy back his novel at that point, but he did not do so.

Senator DECONCINI. But when you or whoever bought it, it is your feeling that they have the right to do whatever they want to with it in their producing a movie or a script?

Mr. GOLDMAN. Yes.

Senator DECONCINI. How does that differ from if you sell your film to someone who buys it from you, and they want to alter it?

Mr. GOLDMAN. Well, I don't feel it is analogous.

Senator DECONCINI. You don't? Why not?

Mr. GOLDMAN. No, because we are making a movie, of which the novel is one element.

Senator DECONCINI. Well, isn't the person——

Mr. GOLDMAN. If they then choose, sir—you know, there is a lot of profanity in Cuckoo's Nest because that is the reality of a mental institution. When the networks then took the film and showed it several times, they "bleeped" the profanity.

Senator DECONCINI. Yes.

Mr. GOLDMAN. Understandably so, or substituted words of their own choosing. I understand that. But I would have been happy to have consulted with them. Children may watch the film. So I would have said, "Please, use this word" or "Use that word." I would have drawn on the best of my expertise and my experience and said, "Here is how we can do this."

Senator **DeConcini**. But you feel it is an infringement on your artistic——

Mr. **Goldman**. Absolutely.

Senator **DeConcini** [continuing]. The fact that they "bleep" it without talking to you?

Mr. **Goldman**. Yes, but I have no rights there. I have no rights because the studio owns the copyright, and they will sell it for television and do with it as they will.

Senator **DeConcini**. And likewise you feel that there is a distinct difference here from the person who writes the book and has a word in it that they think is very important, and you decide, "We are not going to use that word or that phrase or that setting."

Mr. **Goldman**. Well, sir, I think you are—if I may say——

Senator **DeConcini**. Sure.

Mr. **Goldman** [continuing]. You are taking a very narrow view.

Senator **DeConcini**. I am trying to find the difference between the artist who is the writer and creates it out of his mind.

Mr. **Goldman**. All right.

Senator **DeConcini**. To me, his work is just as magnificent to him as it is to the fine work that you do, and I mean that with the greatest respect. I am trying to find a balance of how do you permit the protection from your point of view and not the protection from the person who writes the song or the person who writes the book? Maybe you can help me.

Mr. **Goldman**. Well——

Mr. **Silverstein**. Senator DeConcini, may I offer a comment on that?

Senator **DeConcini**. If Mr. Goldman will yield, you certainly may.

Mr. **Goldman**. Absolutely. [Laughter.]

Senator **DeConcini**. There is a genius right there, in more ways than one.

Mr. **Silverstein**. Mr. Chairman, when a novelist sells a book for a motion picture, he can attach any number of conditions to his conditions of sale. He can say, "Nobody is going to do it. I write the screenplay. I protect every word. There can be no changes. I have total control." Now he may never sell it but he has that choice. But let's assume——

Senator **DeConcini**. Is that ever done, do you know?

Mr. **Silverstein**. I am not aware that it has. It may have been, but the important concept to realize, I think, is that when he sells that book what is being done is, an entirely new work in a different form with totally different aesthetic principles is being created, that is, a motion picture. The motion picture does not pretend to be the book; the book does not pretend to be the motion picture. You will often see a credit: "This motion picture based on a book by. . . ." It doesn't say, "This is One Flew Over The Cuckoo's Nest." There is a clear distinction, and Mr. Kessey had the choice.

None of us have the choice, and what we are essentially asking for in these matters is the choice which is——

Senator **DeConcini**. Well, I appreciate that analysis of it. I think the work that you and other artists do is so magnificent and so much of a national treasure, but I guess because of the prominence that you people have, I also feel some obligation to think about that writer who maybe should be here and explain their view, why they are not protected when you alter it.

Mr. Spielberg.

Mr. **Spielberg**. I would just like to say that I have had three experiences of adapting three novels to motion pictures: "Jaws," "The Color Purple," and "Empire of the Sun." In all three instances the writers, through their agents, made demands, and if the demands had not been met, the writers would not have sold their works to Hollywood.

Senator **DeConcini**. This is part of the contract?

Mr. **Spielberg**. This is part of the contract. The example I would like to offer today is that Peter Benchley asked his agent to ask Mr. Brown and Mr. Zanuck, the producers of "Jaws" who were going to buy his book, could he write the first screenplay? That is the time I came on the project, and Peter Benchley wrote a first-draft screenplay for me, and at that point Peter essentially said, "Well, do anything you want with it. I have taken my shot. I feel vindicated. I had a chance to express my interpretation of my own novel on paper. Now you make a movie from that."

Senator **DeConcini**. That is a good example for me, at least, because you are telling me that that was part of the contractual basis that you had with him.

Mr. **Spielberg**. Yes, it was. He had a choice not to sell the book to Hollywood.

Senator **DeConcini**. Sure.

Mr. **Spielberg**. "The Color Purple" could have remained the Pulitzer Prize-winning novel in everybody's memory, and——

Senator **DeConcini**. Well, are you saying that like Mr. Goldman, then, you should have that same contractual right?

Mr. **Spielberg**. Well, it's beyond the contract. We should have that same moral right to present our work to the general public and, once the public has paid to see it——

Senator **DeConcini**. Well, what if you decide, "It's OK if they change my movie."

Mr. **Spielberg**. That's my choice, also.

Senator **DeConcini**. Yes.

Mr. **Spielberg**. If they come to me and they say, "We have the rights to eight of your films. Pick four that we would like to colorize, or we would like to turn color into black and white," because that is the new thing in 40 years. [Laughter.]

"We would like to turn these films into black and white pictures. Are you going to take us to court?" I would say, "Well, Berne and moral rights gives me a legal leg to stand on, but I am not going to fight for a few of those pictures that I don't really consider to be my favorite films, but I am going to fight you to the mat for 'E.T.' and 'Close Encounters' and some of the others."

Senator **DeConcini**. But what if, when you contract with them for purchasing your film, they say, "Hey, we want the right to alter this later." That is a contractual obligation you could live with if you decided you wanted to do it, right?

Mr. **Spielberg**. Because we work for hire and our union, our labor union, can't really negotiate into that area without affecting our definition as a labor union.

Senator DeConcini. Yes; so then the answer is that as long as it is reserved in the contractual right as well as the moral right, you are satisfied because you can say no in contractual negotiations.

Mr. Spielberg. Yes; Mr. Chairman, very few of us, perhaps 5 percent of the working directors in the motion picture industry, both in television and film, are lucky enough through their past successes to be able to negotiate by contract with the studio heads what would be the equivalent of moral rights through Berne. Very few of us are lucky enough to have that clout. We are here representing the 95, 97 percent of those who don't have any leg to stand on.

Senator DeConcini. Yes, sir. I have other questions, because the subject troubles me, but I would like to protect what you do and what you represent. I think it's vital, and yet I would like to extend it as far as we can.

Let me just ask you one quick question, Mr. Spielberg: If you take a movie like "Ishtar" or "Heaven's Gate," that apparently were big losers at the box office, if a motion picture company buys that movie and loses a lot of money and wants to make an alteration to it, how do you argue that economic moral right?

Mr. Spielberg. Well, may I try?

Senator DeConcini. Because we are talking about a moral right in the sense of an investor who has made a good faith effort, bought a film, it's 2 hours and 10 minutes, and it bombs out and he loses $40 million, and they say, "Gee, if we cut 20 minutes off it, we think it will really be magnificent," and yet the person who produced it and wrote it says no. Is that just tough?

Mr. Spielberg. Well, I would like to first of all say that perhaps somebody who made "Ishtar" or "Heaven's Gate," let's say the principal screenwriter and director, perhaps they liked the movie, whereas no one else did. I am suggesting that they have a right and they should have a choice under moral rights to not allow the distributor or the copyright owner, whether this is fair or unfair, it should be their choice to allow or not to allow them to continue to try in other fashions of exploitation to recoup the initial investment.

I also happen to feel, if I can do the balancing of interests speech here, that I find it very, very strong that if a studio has a slate, an annual slate of 18 motion pictures per year, they are in the gambling business and they know that all 18 pictures are not going to be big hits, so the offsetting element would be the "Star Wars" that would offset the "Heaven's Gate," or with Paramount the "Top Gun" that would offset "Ishtar," or with Columbia.

Senator DeConcini. I understand. Thank you.

Mr. Silverstein. Mr. Chairman, may I give a specific answer to that question? In Paris, when Chairman Kastenmeier held a hearing with five of his committee before the French community of film directors, this specific question that you posed was asked of Sir David Leen and Fred Zimmerman, two of our most senior and respected directors. They said they had never heard of a film that bombed being improved by additional editing. It just doesn't happen. [Laughter.]

Frank Capra once said, "If the concept is right, you can't hurt it. If the concept is wrong, you can't help it."

Senator DeConcini. Well, I don't want to argue with such experts as that but, you know, I think there is a lot of artistic innovativeness out there, in all due respect, that could probably feel that they could improve or disapprove of something that has been done from the standpoint of making it more marketable. I think that is pretty clear.

I yield to the Senator from Vermont.

Senator Leahy. Thank you, Mr. Chairman.

Mr. Goldman, thank you for your statement. I am going to take the references to Members of Congress and what we do and reproduce that. I will take the whole thing, so there won't be any chance of cutting it up, and give it to my wife and children. I think that you said a number of things they have heard me say for 14 years, only you said it a lot better, and I appreciate that.

Mr. Spielberg testified earlier today that "E.T." was duplicated onto video cassettes even before it was released in movie theaters here in this country, and that "E.T." has never been officially released on cassettes—I am correct on that, am I not?——

Mr. Spielberg. That's correct.

Senator Leahy [continuing]. It is consistently rated as the most popular cassette in viewer polls taken in countries around the world. Now, Mr. Spielberg, that has to be in a way a sort of a "good news, bad news" thing for you. The good news is, your movie is popular; the bad news is that it is pirated. Do you think that joining Berne, aside from any of the other matters you have discussed today, just on the specific question, would joining Berne help in the fight against people, foreign pirates, who rip off your work as they did with "E.T."?

Mr. Spielberg. I think it is very important that this country join the other 76 Berne nations and join Berne. It will certainly protect our rights. It will protect our motion pictures from the pirates and, through moral rights, it will give all of us a voice in the destiny of how our films are looked at 100 years from now. I really believe we should join Berne, absolutely.

Senator Leahy. So you support joining Berne?

Mr. Spielberg. Yes.

Senator Leahy. Give me the "but."

Mr. Spielberg. What, the catch? Well, we feel— speaking for the Directors Guild of America—and I personally feel that Berne is inconceivable without moral rights, without article 6 bis, which is very clear in its generous respect to the creative author of the film as opposed to the economic copyright author.

Senator Leahy. But I read with interest the articles that you and Mr. Lucas, the two articles you wrote in The Washington Post this Sunday, and I have some problems with them.

Mr. Lucas, in your article—in fact, Mr. Chairman, I would ask unanimous consent that at some appropriate place, both those articles be made part of the record.

Senator DeConcini. Yes.

Senator Leahy. You expressed outrage at the thought that some feel the American law sufficiently protects artists' rights. Now the experts we have had before our committee, this committee, Mr. Kastenmeier's and others, tell us that U.S. courts have begun to accord the substance of moral rights either under copyright or under a label such as unfair competition, defamation, invasion of privacy, right of publicity, breach of contract, and so on. Why aren't those laws sufficient?

Mr. **Lucas**. I have been told by many lawyers that if one were to sue for many of the indignities that we have presented, that there wouldn't be a case; that those laws really don't go to the heart of the matter of the defacing of an artist's work. I am very interested to hear if there is a law, say for John Huston when "The Maltese Falcon" was recolored. I mean, is there a law that he can go to?

Senator **Leahy**. Well, let's take an example. They tell me that when they colorized the movie "Suddenly," which was a black-and-white film, and Frank Sinatra comes out with brown eyes. Does he have a common-law right to sue, to say, "I've got the patent on 'Old Blue Eyes,'. . ." Is it just a case where perhaps people haven't been innovative enough in their thinking?

Mr. **Lucas**. I have a little familiarity with copyright law, having been a copyright owner, and everyone I have talked to has said there is not a sufficient amount of law there to protect the changing of a work after it has been in the marketplace, and I have never heard of a case where it has come up.

Senator **Leahy**. Well, the reason I asked this, Mr. Lucas and Mr. Spielberg, because you were the authors of the articles.

Mr. **Spielberg**. Yes.

Senator **Leahy**. I am wondering if we are kind of between a rock and hard place. The panel ahead of you, of course they are for Berne, and they have characterized their position differently than I have, but they want to close the door on exploring the area of moral rights, and not just take a minimalist approach.

I read your article as saying you are in favor of Berne, but not if we take the minimalist approach and leave off some language of moral rights. Am I correct, or am I misconstruing your position?

Mr. **Spielberg**. Senator Leahy, we really don't want to be thought of as as unyielding as the panel that preceded us. We think there is a lot of room for discussion with all the Senators and Representatives, and we think that there are all sorts of avenues that will not compromise the issue either for Berne—either for this country becoming a member of the Berne nations or the creative, artistic community having their way.

If I can just tell you what I fear about Berne being passed without moral rights, I am so afraid that the main course of Berne being passed will be such a filling meal that there will be no more room on the menu or an appetite among all of your gentlemen to digest moral rights shortly thereafter or at the same time.

Mr. **Goldman**. I would add that——

Senator **Leahy**. Do you fear the attention span of the U.S. Senate? [Laughter.]

Yes, Mr. Goldman?

Mr. **Goldman**. Well, if I were to write a screenplay on this hearing this morning, had that assignment, I would title it, "Berne Now, Moral Rights, the Fifth of Never." That is what I heard from these various gentlemen opposing moral rights: "Maybe sometime, maybe in the future," they will allow Congress to find a way. It is lying somewhere out there, our protection. But meanwhile passing the Berne Convention is OK because we want to protect our tapes and we want to protect our films, fine, but as far as moral rights legislation is concerned, only "maybe." That is what scares us.

Senator **Leahy**. Just a second here, Mr. Goldman. I am going to read you a memo I received from one of my staff, which I had promised myself I wouldn't do in this hearing. It was after Mr. Spielberg's and Mr. Lucas' articles. He said, "Pat, judging by the articles in last Sunday's Post, it seems that they have come here to defend directors against raiders of the lost art. I hope they don't find themselves in the temple of doom." I'm sorry. [Laughter.]

Mr. **Goldman**. I think it needs a little work. [Laughter.]

Mr. **Lucas**. I would just like to add to what they have contributed, which is from my feeling, and again, I don't represent the Directors Guild or the Writers Guild. I feel that, eventually, moral rights will pass. I feel that if you don't do it now with Berne, outrageous acts will be committed. You can just begin to see what is going to happen with the computer age coming on. The public eventually will rise up and force this body to enact moral rights probably much more stringent than are being considered here today.

My advice to the corporations, which I think is a wise word, is a little bit now may save a lot later. Just a little bit of respect in the artist right now might make it a lot easier for the future. As these new technologies come into being, you are going to find alterations and changes that are going to completely foul up what we now define as copyright in art.

Senator **Leahy**. Well, Mr. Lucas, let me just explore that a little bit further. I think you make a very valid point, but you and Mr. Spielberg, among others, have demonstrated to us what can be done with state of the art special effects in a most entertaining way. It is fascinating. I would suspect you would be the first to say that you couldn't predict yourself 10 years from now what you might be able to do, whether it is in three-dimensional technology, placing people in and out of a scene, rearranging even a past movie, and so on.

A computer reconstruction of an actor now dead being placed into a movie is one thing I have heard discussed. Also, the interactive television in people's homes where they can actually move things back and forth on what they are viewing. These are all things that might be done.

Which is better, for us to try to legislate and figure out and anticipate what might come, or for you and Mr. Goldman and Mr. Spielberg or Mr. Silverstein or anybody else to use your own contractual rights today to lock into place what you have done? Don't the contractual laws and the copyright laws give you the protection you need today?

Mr. **Lucas**. My only problem with that is that, in contract law, you find these rights will be given to the privileged and the powerful. That doesn't affect Steven and I, but what we are talking about are the artists—good artists, bad artists, young artists, old artists. Are we to say that only those artists, who have power and prestige, are to have these rights simply because they can win them in their contracts, while the rest of the artists can't have them?

That is like saying freedom of speech should be a contract, that it should be contract law. That can't be contract law. I mean, it is a moral right to have your reputation, your life work, represented as you created it. It's not——

Senator LEAHY. But freedom of speech is written in the Constitution, and moral rights are not.

Mr. SPIELBERG. I realize that, but you are a legislative body and at some point or another we have to come up with a statement that says that maybe the human species does have some kind of right to freedom of expression and that it has a right to be preserved. I mean, all I am saying is maybe the Founding Fathers didn't consider all this a long time ago and maybe it is time to start thinking about it.

Senator LEAHY. The Founding Fathers never had motion pictures a long time ago.

You understand the problem I am getting at, I mean, how you negotiate, where you go. Even people who may have some rights over their films seem to be willing to sell those rights. I won't watch a movie on an airplane or on television, for example, because I know there have been parts of it cut and it just bothers the hell out of me. I don't think I have ever watched a film on TV unless it is on a video cassette I have either bought or rented, but that doesn't seem to bother——

Mr. LUCAS. Bother who?

Senator LEAHY. Well, whoever sold that film to TWA or to ABC or CBS or whatever.

Mr. LUCAS. Excuse me. Yes, it doesn't bother the corporation because they are making money on it, but it bothers the artists. I know a lot of artists who are very upset about that sort of thing. Many of the artists aren't. If you asked them they would say, "Sure, cut my film up and put it on an airplane," but now the artist doesn't have that choice to say, "No, I don't think this is going to work if you cut all those scenes out. It is not going to be the same piece of entertainment."

The example is commercials cut into films on television. You don't see a lot of films on television any more. They don't work as well. They show them on HBO. They show movies on cassettes because people would rather see them without them being all chopped up.

Senator LEAHY. I agree. Let me just ask my last question, we have gone beyond my time, Mr. Chairman, but I appreciate the extra time. With each of these I will probably want to submit some questions, but let me ask just any one of you, how would a Federal statute on the question of the rights of directors affect your right to bargain collectively? Doesn't that mean that the directors' rights are going to be decided up here by Senator DeConcini and myself and the others, rather than when you sit down in Hollywood or New York and work out your contracts?

Mr. SILVERSTEIN. Senator, I have been the chairman of the Creative Rights Committee of the Directors Guild, which bargains each 3 or 4 years for artistic rights and working conditions. Now that has been true for now some 20 years, and I can tell you that in the last negotiation the specific areas that we are discussing here were proposed across the bargaining table.

What we did gain was the right to consult on all of these things, and we said to the CEO's of the companies who face us, "That is not good enough. The consultation doesn't mean anything because if we disagree, we lose." The answer came back, "That's right. If we disagree, you lose," so that this is a pro forma consideration. This is not a moral right. It is a right of consultation.

Further, there seems to be some definition in the labor law which defines employers as those that have the right to control, and there is some question as to whether as a labor union the DGA could seek to effect its contract rights which exceed the employer/employee period. We would be happy to have our counsel talk with your counsel and illuminate that a bit further. We are prohibited because of certain things.

Senator LEAHY. I really feel as though I go around and around and around in circles on that. I would like to hear from him.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Leahy.

Gentlemen, thank you. It has been very helpful, and I appreciate the time that you have labored through this, and I would like to think it is an intellectual exercise for us to understand just a little better. We appreciate it very much.

We will keep the record open until March 15 for anyone who wants to supplement their statements or respond to any of the questions that were asked here in more detail, and we hope to have a markup on this bill by sometime in mid-April. Thank you very much.

Senator DECONCINI. We will stand adjourned.

Mr. SPIELBERG. Thank you, Mr. Chairman.

[Whereupon, at 1 p.m., the subcommittee adjourned.]

[Responses of panel to written questions by committee members, subsequently submitted for the record, follow:]

RESPONSES OF STEVEN SPIELBERG TO QUESTIONS POSED BY SENATOR DECONCINI

1. You propose that Berne implementing legislation contain a provision that requires the permission of both of the "artistic authors" (the principal director and the principal screenwriter) before any alterations can be made in a film following its first paid exhibition.

My question is this, doesn't this proposal disregard the moral rights of other artists involved in the creation of the film? Why wouldn't the copyright owner have to get the permission of the actors and actresses, the composers and choreographers and even the producer, before making alterations to a film?

The DGA has indicated that the "artistic author" of a motion picture is the principal director and principal screenwriter. Ginger Rogers, speaking for the Screen Actors Guild, Jimmy Stewart and Burt Lancaster have acknowledged that the principal director and principal screenwriter should stand as the representatives of all who participated in the film. The performers and other participants in the film place their trust in the principal director and principal screenwriter to make the final product as good as possible; thus, for the collaborators in the film, the principal director and principal screenwriter are the proper custodians of the moral rights of a film. In other words, the DGA proposal does not disregard the other artists in the film, but recognizes that the practical limitations in a collaborative work requires that only one or two individuals can have the ultimate determination with respect to the moral rights of the work. In any case, the actor and actresses do not compose the "yarn," nor do any of the other collaborators who collaborate in the telling of the "yarn." All are professionally subject to the disciplines imposed by the script and the director.

2. How would this proposal work when only one of the "artistic authors" wanted to give permission to alter the film? What happens when one or both of the "artistic authors" dies - are the moral rights transferrable to others or inheritable through a will?

Since our object is to protect the films and our film heritage, the proposal would require that both the principal director and the principal screenwriter agree to give permission respecting material alteration of the film. If either one fails to give permission, the work could not be materially modified. In the event of death of one of the artistic authors, the Directors Guild seeks that the rights be transferrable to an heir - either a lineal heir or, more preferably, a qualified artistic heir, who would have the capacity to judge the artistic concerns of the principal director or principal screenwriter in judging material alterations. This proposal, by requiring agreement, seeks to make it more difficult to alter a film after its release.

3. I am unsure how the concept of moral rights would actually be implemented. Does everyone who contributes to an art work have moral rights? How does Congress decide who has made an important enough contribution to an art work to have a moral right to object to its modification? When the credits roll at the end of movies, I see hundreds of names, how do we determine who among them has the right to object to how their work is presented?

While the theory of moral rights would attach broadly to authors of works, in the case of collaborative works, such as films, as noted above, it is necessary to have the limited number of persons, who have created the yarn and directed its telling, involved in the approval of material alterations. Under these circumstances, the principal director and principal screenwriter, who are involved in the project from its conception to final editing, stand most logically in the position of the ones who can make the judgments with regard to material alterations. Any system which would permit hundreds of persons to object to changes in collaborative works would leave the implementation in a state of utter confusion and are not justified by the realities of the film-making process.

RESPONSES OF GEORGE LUCAS, BO GOLDMAN, AND STEVEN SPIELBERG TO QUESTIONS POSED BY SENATOR GRASSLEY

1. As I understand your position, you would like to see an expansion of so-called moral rights, correct?

It is our position that if the United States is to adhere to the Berne Treaty, it is an essential obligation of the Treaty that moral rights protection be provided under U.S. law. The moral rights requirements, set forth in Article 6bis, are, in our view, not sufficiently available at the present time under U.S. law. Under this circumstance, we believe that in order for the United States to fully and faithfully adhere to the Treaty, a clear statement of the existence of moral rights in the United States is required by the Congress in the Berne Implementation Amendments.

2. Wouldn't this pose problems for the movie studios? Let me give you an example: A studio has a movie it is ready to produce and is ready to spend millions of dollars and hires a young director, perhaps the top graduate of one of the film schools. If the studio is concerned that this untried and unproven director could claim authorship on any revisions made by the studio, isn't it less likely that the studio will give new directors a chance? Won't the result be that fewer films may be made because the studios will be concerned about law suits if they make changes in the director's work?

The Director's Guild of America has indicated that in its view the moral right of the principal director and principal screenwriter to object to changes would not occur until after publication or theatrical release, which is "the first paid, public exhibition of a film following previews, trial runs, and festivals, all of which provide input leading to the final released version of the film." As you can see, as a result of this definition, the film-making process would not change one iota from the present arrangement. The concern expressed in the question would not materialize because all directors and writers, including the young, unproven director would be subject to employment contracts in connection with the making of the film. However, once the film was publicly released after the employer/employee relationship is ended, as defined above, and the director's and screenwriter's reputations, as well as the reputations of all other participants in the movie, stand to be affected by the reception of the film, we strongly believe that the principal director and principal screenwriter should be given the right to object to material changes in the film that could affect reputation.

3. And what about the situation where there is more than one director or writer in a film? As I understand it, "Gone With The Wind" had more than one director. Who would be entitled to claim authorship in that situation?

Under DGA and WGA labor contracts and customs, directors and screenwriters, (if there were more than one), are identified for credit purposes. They are customarily listed in the order of the importance of their contribution. The order is determined by the appropriate Guild. Under DGA criteria it would be these individuals, rather than several directors and several writers who would be entitled to claim authorship. The principal director (as he/she does during the production of the film) and principal screenwriter would serve as the moral anchor for all persons working on the film.

4. As a practical matter, doesn't the Director Guild negotiate a lot of these issues that come under the heading "Moral Rights"? Why should Congress be involved in something that private parties are able to handle very successfully by contract?

If the DGA were able to handle these matters strictly by collective bargaining agreement, Congressional intervention would be unnecessary. However, by virtue of the collective bargaining agreements that are in place respecting the Directors Guild and the Writers Guild, these issues may not subject to mandatory collective bargaining. Under these circumstances, the DGA and WGA agreements may resolve these matters for their memberships.

5. I think I also understand your position to be that moral rights will protect against, or at least give the film creators a claim, in the event their work is altered in situations like colorization. But aren't there already a lot of changes that are already made in films for the various markets and aren't these changes ones which add to the marketability of films? For example, films are dubbed and edited for foreign markets; films are changed for TV audiences. And aren't these situations already provided for by contract between the various parties?

Under current DGA agreements, directors are granted a right of consultation in connection with the placement of commercial breaks and other changes*/ for network exhibition of their film. This result could represent a matrix for editing for syndicated television exhibition. However, when a film is sold in syndication, the director has no involvement whatsoever in the editing decisions. The motion picture production companies, during labor negotiations with the DGA, have indicated their unhappiness with the gross editing of films in the syndication markets but claim they are helpless because the policing problem is too great.

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*/ Please see 1984 collective bargaining agreement DGA, pages 52-54 ¶7-509.

6. We have heard testimony about the importance of Berne for international trade reasons and to give us a weapon against piracy. For these reasons, a broad coalition on Berne adherence has formed. But moral rights seems to be the controversy that could jeopardize our signing Berne. Don't you think we should put the bigger moral rights question aside for the moment in an effort to get adherence to Berne? Or do you feel that the moral rights issue is so important that, without it, there would be no reason to pass Berne implementing legislation?

The Directors Guild believes that by executing the Berne Treaty, the United States is making an acknowledgement respecting the status of its moral rights laws. To give full faith and credit to the moral rights provision of the Berne Treaty, U.S. law must provide protection with regard to paternity and integrity of artistic works. The Directors Guild believes that while U.S. law is tending in the direction of greater moral rights protection, it is still insufficient to give such full faith and credit to the Berne obligation; thus, if the Congress were to adopt the Berne Convention, it should clarify U.S. law and bring it into clear compliance with regard to moral rights.

7. Imagine that you sought to make a movie based on a best-selling novel. Your producer purchases the right to the book and you proceed to make a film adaptation. Under a moral rights regime, would the author of the book have the right to object to (or enjoin) your movie if he didn't like the way it turned out? What if you took a well known literary character and changed him substantially?

As the Directors Guild and Writer Guild have explained in questioning by senators, when a film director and screenwriter produce a motion picture based upon a book, they are creating a totally new and different work, created according to totally different aesthetic principles. As an initial matter, the novelist determines whether to sell his rights in that work for film production and under what conditions. If that choice is made, the book author has passed his work on to the film director and writer for their interpretation and to create a new work. While questions respecting the faithfulness of the film to the book could come within the general parameters of the contract between the producer and the novelist, there would be no separate right of the novelist to enjoin the film production if the contract did not otherwise permit it. The same analysis would apply to literary characters who are owned by novelists. If a novelist has by contracts agreed to permit adaptation of a book character to a film, then that contract should determine whether changes made in the characterization are permissible.

8. Would moral rights adhere to all copyrighted materials, or only "art?" What would the term "art" be deemed to include? Would it include telephone directories

and fabric designs which can be copyrighted? Should we encourage a system in which courts determine what is art and what isn't?

Under the Berne Convention, moral rights attach to works of authorship. The definition of authorship and qualifying works is subject to interpretation by the laws of the individual countries. Recalling that the key concerns in the moral rights provision is that the work be properly attributed to the author and that no mutilation of the work be made which would injure the honor or reputation of the author, it is clear that objections to changes of some copyrighted works would be far more significant than others. Under any circumstance, we anticipate that the ultimate arbiter of moral rights, just as in the case of copyright rights, would be the U.S. courts, which would be guided by Congress.

9. Did Woody Allen violate moral rights by dubbing a Japanese spy movie to make What's Up, Tiger Lily?

A director's dubbing or translation of a film can have moral rights implications. Certainly, at the time the film What's Up, Tiger Lily? was made, Woody Allen proceeded, as we understand, pursuant to a contract which was consistent with the state of U.S. law at that time. He has subsequently said that he wished he had never made "What's up Tiger Lily?" and the Directors Guild and Writers Guild believes that dubbing, which can constitute a material alteration of the film, should be done under approved circumstances.

[From the 1984 collective bargaining agreement DGA]

Right to Be Present and to Consult

The Director shall have the right, subject only to his or her availability, to be present at all times and to consult with the Employer throughout the entire postproduction period in connection with the picture. The Director must be notified of the date, time and place of each postproduction operation. The Director shall be afforded a reasonable opportunity, subject to his or her availability, to screen and discuss the last version of the film before negative cutting or dubbing, whichever occurs first.

A postproduction locale will not be selected for the purpose of depriving the Director of his or her postproduction rights. The Director shall be informed of the intended postproduction locale in his or her deal memo.

Delivery Date for Television Film

Notwithstanding anything to the contrary in this Article 7, it is understood and agreed that with respect to television motion pictures, the Director's editing privileges herein set forth may not be exercised where the preparation of any television film for a projected delivery date does not permit the expenditure of any or all of the time which would be required by the exercise of the Director's cutting rights.

Right to Director's Cut

It is understood and agreed that the Director's right to prepare his or her Director's Cut is an absolute right subject to the terms and conditions of this BA.

The use of CMX or other technological changes whether now known or not, which involve the physical editing of film or tape or other recording devices, whether now known or not, shall in no way limit or abridge the Director's right to prepare his Director's Cut, within such technology.

Editing Theatrical Motion Pictures

(a) This Paragraph 7-509 applies only to theatrical motion pictures, which are subject to this BA and the principal photography of which commenced during the term of this BA.

(b) Employer recognizes that it is desirable for theatrical motion pictures to be telecast without abridgment except as required by Network Broadcast Standards and Practices. To this end, Employer will endeavor to license films for network telecasting with no abridgment other than for the aforementioned Broadcast Standards and Practices reasons. In any event, Employer agrees that the Director, if available, shall be accorded the first opportunity to make such cuts as are required if a film is required to be abridged for network telecast. In the event the Director of such picture is deceased, the Guild will appoint a Director of comparable stature and ability to discharge such functions who will be deemed substituted for the original Director in all respects under this Paragraph 7-509. Such "Director abridging cut" shall be done for the Employer at no additional cost, and subject to its approval. It is the intention of the foregoing that in the first instance and as far as practicable, the abridgment, if any, of theatrical motion pictures shall be accomplished by the Employer, with the participation of the Director, as aforementioned, and not by the network acquiring telecasting rights in the theatrical motion pictures.

(c) If a motion picture is licensed by Employer for United States network free television or for United States national network pay television exhibition under a contract which provides that the network may edit the motion picture for such exhibition the Employer agrees to obligate the network or the distributor to consult with the Director of such motion picture with regard to such editing done by the network, subject to the following conditions:

(i) The Employer or the distributor shall notify the Director in writing, at Director's last address known to Employer or the distributor, that such motion picture has been so licensed and is to be edited for such exhibition by the network. A copy of such notice shall be mailed to the Guild. If the Director wishes to be consulted by the network or the distributor with reference to such editing, the Director shall, within five (5) business days after service of such notice, notify the Employer and the distributor in writing that the Director so desires to be consulted. Upon service of such notice by the Director, the Employer or the distributor shall notify the network that the Director wishes to be consulted with reference to such editing. The Employer shall obligate the network or the distributor to give the Director who has served such notice, reasonable notice of the time and place at which the network or the distributor will consult with the Director with reference to such editing. If the Director reports at the time and place so designated, the network or the distributor shall then be obligated to consult with the Director and in such consultations, the Director may express his views with regard to the editing of the motion picture for such network television exhibition. As between the Director and the network and the distributor, however, the final decision as to such editing shall rest with the network and the distributor. The requirement of consultation with the Director, as set forth above, shall not apply where no editing is done by the network or in any case in which the exigencies of time do not permit, or if the Director does not make himself or herself available at the time and place designated as aforesaid.

(ii) The Director's services in connection with consultations shall be provided at the time and place specified in the notice at no cost to the network or Employer or the distributor.

(iii) The consultation rights of this Paragraph 7-509 shall apply to all editing of a theatrical motion picture released for such network exhibition. For this purpose only, the word "editing" includes placement of or changes in commercial breaks, interruptions, and promotional announcements.

If a motion picture is licensed by Employer for United States syndication and Employer edits such motion picture at its own facilities, the Director, if available, shall have the right to edit the motion picture if no additional costs are thereby incurred.

If the Employer desires to have new footage shot and added to the motion picture beyond the theatrical version, the Director (subject to reasonable availability) shall be offered employment to shoot such new footage as and to the extent required by Employer at a daily compensation rate no less than one-half of the Director's initial daily compensation rate on the motion picture.

Employer agrees not to license or edit or authorize any licensee to edit feature length theatrical motion pictures in versions of less than two hours duration or the length of the picture as released for general theatrical exhibition, whichever is lesser, (except for Standards and Practices requirements) for in-flight use as defined in subparagraph 18-102 (b) (e.g., to avoid 45-minute versions of motion pictures previously licensed as theatrical films for use on Continental Airlines). In the event of any inconsistencies between the provisions of this subparagraph and the balance of Paragraph 7-509, then the provisions of this subparagraph shall control.

The provisions of this Paragraph 7-509 shall also apply if a theatrical motion picture is licensed by Employer for domestic videodisc/videocassette distribution.

APPENDIX

ADDITIONAL STATEMENTS

THE AMERICAN INSTITUTE OF ARCHITECTS

STATEMENT ON THE BERNE CONVENTION IMPLEMENTATION ACT OF 1987

by

David E. Lawson, FAIA

on behalf of

The American Institute of Architects

before the

Subcommittee on Courts, Civil Liberties
and the Administration of Justice
of the Committee on the Judiciary

U.S. House of Representatives

February 9, 1988

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Mr. Chairman and members of the Subcommittee, my name is David E. Lawson, FAIA. I appear today on behalf of The American Institute of Architects, the professional association representing this nation's architects. I have been a practicing architect for 26 years and I have served on the AIA Board of Directors as well as Vice President of the American Institute of Architects. We appreciate this opportunity to express our views on legislation to implement the provisions of the Berne Convention affecting architectural works.

INTRODUCTION

Copyright protection for architectural works under U.S. copyright law is significantly different from the protection provided under the laws of the other nations that have signed the Berne Convention. Implementation of the Convention would require that the U.S. law be made compatible with the laws of other signatories, and legislation has been introduced to do this. The AIA supports implementation of the Berne Convention's protection of architectural works, and generally favors the legislation designed to accomplish this purpose. At the same time we have reservations about several of the provisions contained in the different legislative proposals. My testimony will explain those reservations.

CURRENT U.S. COPYRIGHT LAW

Neither architectural works nor architectural drawings are explicitly mentioned in current U.S. copyright law. It is generally recognized, however, that the law protects drawings under the pictorial, graphic, and sculptural works category.[1] Some authorities have argued that current law could be interpreted to go beyond architectural drawings to protect (1) the construction of a building depicted in the plans even if the drawings are not copied, as well as (2) the actual structure shown in the drawings.[2] Case law, however, has clearly established that only architectural drawings are copyrightable. A copyright is infringed when the drawings are copied.

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[1] 17 U.S.C. 102 (a) (5). See also Notes of the Judiciary, House Report No. 94-1476, 94th Cong. Sess. (1976), p. 55, which states in part "[a]n architect's plans and drawings would, of course, be protected by copyright..."

[2] Shipley, Copyright Protection for Architectural Works, 37 S.C.L.Rev. 393 (1986).

Notes of the Committee on the Judiciary in House Report No. 94-1476 indicate that with regard to pictorial, graphic, and sculptural works there is "no implied criterion of artistic taste, aesthetic value, or intrinsic quality." The subject matter provisions of current law expressly protect "original works...in any tangible medium of expression."[3] These provisions also expressly exclude the protection of an idea.

Case law has offered the following interpretations of our copyright law with regard to architectural drawings.

- "While the concept of a T-shaped building is not entitled to copyright protection, detailed plans and drawings of a specific building are."[4]

- "A person cannot, by copyrighting plans, prevent the building of a house similar to that taught by the copyrighted plans. One does not gain a monopoly on the ideas expressed in the copyrighted material by the act of registering them for a copyright. A person should, however, be able to prevent another from copying copyrighted house plans and using them to build the house.[5]

- A contractor's reproduction of an architect's drawings for use on a subsequent project has been held to be an infringement of the architect's copyright and not a fair use.[6]

- Federal courts have held that drawings and specifications prepared by an architect are not "works made for hire."[7]

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[3] 17 U.S.C. 102

[4] Nucor Corporation v. Tennessee Forging Steel Services, Inc., 476 F.2d 386, 390 (8th Cir. 1973).

[5] Herman Frankel Organization v. Tegman, 367 F.Supp. 1051, 1053 (E.D. Mich., S.D. 1973).

[6] Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Company, 542 F.Supp. 252, 260 (D.Neb. 1982).

[7] Aitken, Hazen, Hoffman, Miller, P.C., supra, and Meltzer v. Zoller, 520 F.Supp. 847 (D.N.J. 1981).

Since current copyright law offers limited protection for architects, the profession has looked to its contract documents as an additional aid. In the traditional architect-client relationship, the architect is an independent contractor--not an employee. The Standard Form of Agreement Between Owner and Architect is published by the AIA and enjoys wide acceptance. This agreement clearly states that "unless otherwise provided, the Architect shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights, including the copyright." Further, "[t]he Architect's Drawings, Specifications or other documents shall not be used by the Owner or others on other projects, for additions to this Project or for completion of this Project by others...except by agreement in writing and with appropriate compensation to the Architect."

Similar language appears in the AIA document, General Conditions of the Contract for Construction. Because in the traditional construction situation there is no contractual relationship between the architect and the general contractor, this document is normally adopted by reference into other agreements including the owner-contractor and the contractor-subcontractor agreements. This is done in order to establish a common basis for the preliminary and secondary relationships on the typical construction project.

These provisions accomplish some very important purposes. They secure the creative integrity and reputation of the architect, protect the architect's economic interests and address serious liability concerns. These provisions can help the architect prevent the modification of drawings and specifications by others--modifications that could compromise structural or aesthetic integrity and ultimately place the architect whose seal is on the drawings in a difficult liability position.

PROPOSED CHANGES IN U.S. COPYRIGHT LAW

Having summarized the status of copyright protection for architects under current law, I would now like to comment on the three bills to implement the Berne Convention. Each is entitled the Berne Implementation Act of 1987.

American architects make significant contributions to the arts and the quality of life in our society. Architects' contributions are at least as significant as those of the authors of literary, musical, dramatic, audiovisual and sound recording works explicitly recognized as protected subject matter in our existing copyright laws. Architects design our homes, schools, workplaces, and public places. They also work to restore and preserve the best of our architectural heritage. Our citizens come into contact with the works of architects daily. The AIA, therefore, welcomes the express recognition of architectural works in the proposed legislation.

There seems to be a growing consensus that a moral rights provision allowing the author to object to any alteration of the work that would prejudice the author's reputation is not necessary for Berne compliance. This Subcommittee has heard from others on the subject. My comments regarding moral rights, therefore, will be brief. H.R. 1623 gives these rights generally at 106a, but then at 120 severely limits the scope of exclusive rights in architectural works. It is not at all clear that as a practical matter the moral rights provisions would be very meaningful for architectural works.

The AIA strongly objects to the "artistic character" requirement for copyright protection that appears in H.R. 1623 and S. 1301. The artistic criterion does not appear anywhere else in our copyright law. It is not a requirement for literature, drama, music, or any other subject matter. In a 1903 U.S. Supreme Court opinion, Justice Holmes warned against judicial opinions about what is artistic:

> It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation...At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.[8]

There is also support for our position in the recent amendment of French law to remove the artistic character requirement for copyrighting photographs.[9]

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[8] *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

[9] Ginsburg, *Reforms and Innovations Regarding Authors' and Performers' Rights in France: Commentary on the Law of July 3, 1985*, 10 Columbia-VLA Journal of Law and the Arts 83 (1985).

At 120 of H.R. 1623 and 119 of S. 1301, the exclusive rights of a copyright owner in architectural work is made to apply only to the "artistic character and design of the work, and shall not extend to processes or methods of construction." If as Louis Sullivan taught, "form follows function," in architecture how can artistic design elements be separated from utilitarian ones? Further, construction processes and methods normally are not controlled by the architect. The AIA document, General Conditions of the Contract for Construction, states that, "[t]he Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures...[of construction]."

The AIA supports the H.R. 2962 definition of architectural works, which does not include the artistic criterion.

Under the scope of exclusive rights provisions in H.R. 1623 and H.R. 2962, the copyright is not infringed by the making of a photograph or pictorial representation of the work. The definition of architectural work, however, includes plans, blueprints, designs, and models (H.R. 2962 also includes sketches, drawings, and diagrams). The literal conclusion, then, is that copying the drawings is not an infringement under these bills, which leaves architects without the only protection available under current law. We are confident that this conclusion was not intended. The statement in S. 1301 is somewhat clearer. It states that the copyright in an architectural work does not include the right to prevent the making of photographs, etc., "when the work is erected in a location accessible to the public." We urge that the language be changed to make it clear that the copying of drawings is an infringement of the copyright.

Further, the provision that a copyright in an architectural work is not infringed by photographs or pictorial representations implies that the copyright is infringed by the unauthorized building from the plans or an architectural reproduction of the work. We believe that the very significant benefits of the implications should be made explicit. If the legislative intent is clear, some future litigation may be avoided.

Similarly, all these bills state that, "[t]he owner of copyright in an architectural work shall not be entitled to obtain an injunction...restraining the construction of an infringing building or structure if construction has substantially begun (emphasis added)..." This provision implies that an injunction is available if construction is not "substantially begun." A problem, however, is that there is no definition of "substantially begun." AIA believes that these implications should be made explicit and "substantially begun" defined.

CONCLUSION

American architects have enjoyed substantially less copyright protection than their counterparts in other countries. Recognition of architects' contributions to the arts and society in our copyright laws is long overdue. The legislation proposed to implement the Berne Convention represents a welcome statement of the value of architectural works in all their forms of expression. With the amendments we have suggested, the American Institute of Architects is happy to endorse this legislation.

This concludes my testimony. I will try to answer any questions Subcommittee members may have.

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UNITED STATES ADHERENCE TO THE BERNE CONVENTION

Statement of the
Information Industry Association
before the
Subcommittee on Patents, Copyrights,
and Trademarks
Committee on the Judiciary
United States Senate
100th Congress, Second Session
on
S.1301 and S.1971
March 15, 1988

Summary of the Statement of the
Information Industry Association
March 15, 1988

The Information Industry Association (IIA) strongly supports U.S. adherence to the Berne Convention, because of the IIA's perspective on the importance of effective copyright protection in areas of new technology in the United States and abroad. IIA members create and distribute information products and services in a global marketplace, where the pace of piracy makes effective protection essential.

Berne adherence provides IIA members numerous benefits, including: the high standards of protection it requires for works of new technology; more reliable protection in Berne countries without needlessly expensive and uncertain "back door" publication; copyright relations with additional countries; more effective participation in the development of international copyright policy for works of new technology; and, in combatting international piracy, a better bargaining position, both bilaterally and multilaterally in the GATT. Berne adherence will enhance the substantial contribution of copyright revenues to our balance of trade, and strengthen our international competitiveness.

Berne requires only minimal changes in U.S. law, and the enabling legislation should make only those minimal changes. No change is required in U.S. law on moral rights, because protection under common law, various state statutes and the Lanham Act already complies. However, a few U.S. copyright provisions must be changed because they are "formalities" prohibited by Berne. The mandatory notice requirements of §§401 and 402 should be made optional, and §§403 and 404 should be revised to reflect this change. Sections 405 and 406 should be amended to limit their application to copies distributed prior to the effective date of the enabling legislation.

The registration provision of §408 is essentially compatible with Berne, because it is permissive, not mandatory. The registration provisions of §410(c) (prima facie evidence) and §412 (statutory damages and attorney's fees) provide valuable incentives to IIA members to register, and should also be retained, because they are not conditions for copyright protection. We also urge retaining the compatible provisions of §§205(c) and 205(e), which, in the context of recordation, provide additional incentives to register.

The IIA concurs with the Ad Hoc Working Group, however, that registration and recordation as prerequisites to suit under §411 and §205(d) are incompatible with Article 5(2) of Berne because they interfere with "the enjoyment and the exercise" of copyright rights. For that reason, those requirements should be deleted in the enabling legislation. Sections 410(c) and 412 (together with §§205(c) and (e)) provide powerful incentives for registration, and IIA members and most other copyright proprietors will continue to seek such registration.

Our national library system serves a most important role, and Berne compatibility fortunately requires no significant change in the valuable provisions of §407, since non-compliance results only in fines but does not affect "the enjoyment and the exercise" of copyright rights.

I. THE IIA

The IIA, founded in 1968, is the trade association representing over 600 information publishers and information service organizations in the United States and abroad. The IIA's membership includes companies providing leadership throughout the world in creating and managing information products and services as well as communications and computing services. These products and services include database publishing, financial information services, information management software, videotex, communications and computing networks, and other areas of new information technology and innovation.

These companies collect, create, store, analyze, manage, and distribute information both electronically and through traditional means in a variety of products and services useful to their customers. One of the information services of particular importance for many IIA members is that of providing computerized databases -- whether full-text, citations, abstracts or numeric data -- for access by customers at the customers' own locations. These companies sell access, or subscriptions, to their information products and services, thereby making possible effective, rapid retrieval and use of proprietary information domestically and internationally.

Many IIA companies meet a market need for information by arranging or otherwise enhancing raw information available with permission or from government sources. IIA members fulfill this so-called value-added function by preparing compilations and other derivative works that are protected under our copyright law, and have been especially useful in meeting the needs of information users throughout the world.

The IIA urges that the United States do what it should have done long ago: join the Berne Convention. In urging Berne adherence, we join the many companies and associations that are subscribers to the principles of the National Committee for the Berne Convention (NCBC) and subscribers to the principles of the Coalition for Adherence to Berne (CAB). We understand that the NCBC and CAB statements have been made a part of the record, and the IIA heartily endorses those statements.

We are grateful to Chairman DeConcini for conducting hearings on Berne adherence, and to Senators Leahy and Hatch for the preparation and introduction of enabling legislation.

We have divided our statement into three parts. We discuss first the IIA's perspective on technology, information and the international marketplace. We next address the IIA's reasons for supporting adherence to the Berne Convention. We turn then to discuss specific issues concerning U.S. copyright formalities.

II. THE IIA OFFERS A PERSPECTIVE ON TECHNOLOGY, INFORMATION AND THE INTERNATIONAL MARKETPLACE

It is with particular concern for technology, information and the international marketplace -- the perspective of IIA members -- that we urge adherence. The IIA membership deals with present and future applications of new technology to the creation and dissemination of information in a marketplace that is global. Information technologies are expanding rapidly; and, equally rapidly, their international significance is growing. Media for disseminating information now include print and much more, and the market for IIA members is now both an American and a foreign market.

The new technology of information encompasses information content, information media and information transmission. The content of information is no longer confined to traditional categories of literary and artistic works; it includes not only belles lettres and music but also electronic databases and computer software. At the same time, the media of information are no longer limited to print readable to the eye, but embrace as well microfiche, magnetic tape, magnetic disks such as CD-ROMs (compact disk-read only memories), semiconductor chips and laser-generated optical disks.

Finally, the means of transmitting information are no longer restricted to transporting a book or other physical object from one place to another but have expanded to instantaneous world-wide telecommunications by satellite. It is commonplace to use such transmissions from one continent to another to access online databases, to deliver a computer program or other work to a customer, and to utilize videotex and other interactive communications.

Both our government and the American business community have emphasized that the marketplace for U.S. information products and services is international. The Commerce Department recently characterized the marketplace as one in which "the United States is the largest provider of database services . . . . U.S. databases are particularly successful on world markets." U.S. Department of Commerce, 1988 U.S. Industrial Outlook at 51-4 (Jan. 1988). Eighteen of the twenty leading international databases (ranked by number of customers) originate in the U.S. The Business Roundtable has pointed out the significance of information goods and services for the global economy:

> With the rapid growth in the use of telecommunications and information technologies, the transfer of information is . . . becoming as significant as the transfer of goods and capital in the economic relations among nations.

Business Roundtable, International Information Flow: A Plan for Action, at 1 (Jan. 1985).

At the same time, the U.S. software industry holds an estimated 70 percent of the world market.[1] Between 40 and 50 percent of total United States exports consist of services and high technology products; business and information services are the most rapidly growing service sector components. Annual Report of the President of the United States on the Trade Agreements Program 1984-85, at 43 (Feb. 1986).

III. THE IIA STRONGLY SUPPORTS U.S. ADHERENCE TO THE BERNE CONVENTION

New technologies for the transmission and use of copyrighted works have made the market for such works a global market. U.S. copyright owners earn billions of dollars every year from the sale or license of their works in foreign countries. Unfortunately, they also lose billions of dollars through inadequate or ineffective copyright protection of their works abroad. It is therefore vital to provide adequate and effective international protection for U.S. copyrighted works.

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[1] U.S. Department of Commerce, A Competitive Assessment of the U.S. Software Industry at v (Dec. 1984). This estimate was based on the 1983 market, but we have been informed by the Commerce Department that the estimate remains valid.

The Berne Convention is the premier international copyright convention, because of its high standards of protection and its broad membership. Although the Berne Convention became effective back in 1886 and has been revised several times since, the United States has never adhered.

The IIA believes that adherence is now urgent, and appreciates the efforts of the Subcommittee in working toward that goal.

We believe the United States should adhere to Berne now for the following reasons.

A. International Piracy Makes Imperative More Effective Copyright Protection Abroad

The rapid pace at which pirates undermine the value of U.S. works abroad makes greater international protection for these works imperative. We believe that we can achieve that goal only if the U.S. becomes a full member of the international copyright community by adhering to Berne.

Piracy of U.S. works abroad is rampant. In a 1985 report, the U.S. International Trade Commission estimated that U.S. copyright industries lose over $1.3 billion a year as a result of inadequate and ineffective protection in only ten countries selected for study. Recommendations of the Task Force on Intellectual Property to the Advisory Committee for Trade Negotiations, at 2 (Oct. 1985).

Computer software and databases are particularly susceptible to piracy, because of the ease with which they can be copied and disseminated. It is estimated that U.S. software vendors lose $500 million annually in overseas sales due to piracy. Gorlin, "Protecting Intellectual Property," Wall Street Journal, July 30, 1987 (Eur. ed.).

Thus, a high level of international copyright protection is needed. Although the U.S. does belong to an international copyright treaty, the Universal Copyright Convention (UCC), the UCC is a "low-level" treaty. Furthermore, U.S. effectiveness in the UCC has been substantially diminished by our withdrawal from UNESCO.

It is the Berne Convention that establishes high levels of international copyright protection. Berne sets out minimum standards for protection -- at a high level -- which all member countries must grant to works of other member countries. These high standards are important where, as with the products and services of IIA members, traditional principles of copyright protection must continually be applied to works of new technology. The Berne standards have the needed breadth and strength for this purpose.

For example, Berne requires that authors be given an "exclusive right of authorizing adaptations, arrangements and other alterations of their works." Berne Convention, Art. 12. (Berne references are to the Paris Act, 1971, the Act to which the U.S. would be adhering.) This right is of particular importance for creators of value-added databases and derivative works based upon them, and for the creators of computer programs and their updates and enhancements.

Adherence Will Gain Protection in 24 Countries

Adherence to Berne will gain protection for U.S. copyrighted works in 24 countries which are members of Berne, but not the UCC. In addition, as Register of Copyrights Ralph Oman testified before the Kastenmeier Subcommittee on July 23, 1987, the People's Republic of China is in the process of developing a new copyright law and is considering adherence to Berne. (The United States, the USSR and China are the only major countries which have not adhered to Berne.)

Adherence Would Remove the Expense, Inconvenience and Uncertainty of "Simultaneous Publication"

Even without United States membership in Berne, many copyright owners, recognizing the value of Berne protection, now attempt to secure protection in Berne countries by first publishing a work simultaneously in the U.S. and a Berne country. A work is entitled to the protection of the Convention, regardless of the nationality of its author, if it is either first published in a Berne country or published "simultaneously in a country outside the Union and in a country of the Union." Berne Convention, Art. 3(1)(b).

Simultaneous publication, however, can be expensive, inconvenient and legally risky. To qualify for Berne protection, copyright proprietors may, for purely legal reasons, have to contort distribution plans that would otherwise be based on more appropriate business considerations, solely to provide for concurrent initial marketing in a Berne country. Kenneth Dam, IBM Vice President of Law and External Relations, testified before this Subcommittee that simultaneous publication to achieve "back door" Berne protection costs IBM an estimated $10 million a year. Statement of Kenneth W. Dam, Vice President, IBM Corporation, before the Subcommittee on Patents, Copyrights, and Trademarks, Committee on the Judiciary, U.S. Senate (March 3, 1988) at 6. Indeed, for many authors and small publishers, simultaneous publication is too expensive even to be attempted, and thus they are unable to obtain "back door" protection under Berne.

It is not always clear what constitutes "publication" in a foreign country, particularly for works of new technology, such as databases. Publication under U.S. law can itself be a complex and uncertain concept, and there are still fewer certainties as to when publication in another country is achieved "simultaneously" with publication here. Proving simultaneous publication in an infringement action abroad may require considerable documentary and other evidence, and is likely to be difficult and expensive.[2]

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[2] The difficult and burdensome nature of proof of simultaneous publication was aptly illustrated by Peter F. Nolan, Vice-President-Counsel of The Walt Disney Company, who testified before the Kastenmeier Subcommittee on September 16, 1987 on behalf of the Motion Picture Association of America (MPAA) in support of U.S. adherence to Berne. Mr. Nolan explained that a senior vice president of one of the MPAA's members recently had to travel to Thailand on two separate occasions to prove simultaneous publication in a Berne country, in order to stop a Thai film
(Footnote Continued)

On a more general level, using the back door to Berne detracts from our credibility and impairs our copyright relations with other countries. Berne countries in which an American copyright proprietor attempts simultaneous publication sometimes resent U.S. attempts to benefit from the Convention while not shouldering its responsibilities. The back door earns this country no friends. If an infringement action were brought in such a country, a court might seek to find some technical defect in the simultaneous publication.

Even more serious, such resentment could provoke retaliation by Berne countries. They might simply refuse to accept certain types of back door publication, or they might restrict protection of U.S. works under Berne Art. 6(1). The threat of the European Community to retaliate against us for our reliance on the ill-reputed manufacturing clause provided an apt example of another kind of possible retaliation.

(Footnote Continued)
pirate from selling videotapes of that company's motion pictures. Statement of the Motion Picture Association of America Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee (Sept. 16, 1987), at 4. Unfortunately, as Mr. Nolan explained in a January 25, 1988 letter to Chairman Kastenmeier, that expense and effort was unavailing: the Thai court recently ruled that the motion pictures in question were not simultaneously published.

If the United States joins Berne, the works of U.S. nationals will be protected in Berne countries even if unpublished, and works of any nationals will be protected here if first published in _either_ the United States _or_ any other Berne country. Thus, the expense and uncertain consequences of simultaneous publication will no longer be problems.

B. _Adherence to Berne Will Allow the U.S. To Participate Effectively in Developing International Copyright Policy for Works of New Technology_

The rapid pace of technological change demands continuing development of enforceable international copyright guidelines to accommodate new technology. Rules for international protection of new information technologies are likely to be defined in the forum provided by Berne and the World Intellectual Property Organization (WIPO), which functions as the secretariat for Berne. Although the U.S. is a member of WIPO, it must be a part of Berne to present its views with full effect.

WIPO has significant expertise in areas of new technology important to the IIA and to authors generally, and has demonstrated that expertise in areas relating to IIA concerns. It has, for example, convened a number of meetings of international committees of experts to develop appropriate methods of worldwide protection for computer software, and for the "mask works" embodied in semiconductor chips.

However, questions of protection for works of new technology continually arise, and our active participation is necessary to ensure that our views are effectively put forward and the interests of U.S. authors adequately protected. For example, at the proceedings of the Committee of Experts on the Printed Word in Geneva last December, representatives discussed protection for computer databases and considered the possibility of reducing their scope of protection. Our active participation as a Berne member would aid us to counter more effectively such attempts to lower the levels of protection (and, consequently, the levels of compensation) for valuable U.S. works of authorship.

Some have expressed concerns that divisive factors within the Berne community could impair the high-level standards of protection under the Convention or make it difficult for the U.S. to further the goals of international copyright protection. However, this argument provides more reason -- not less -- to join Berne, so that we can lead the efforts to ensure effective international copyright protection for works of new technology, as well as for other copyrighted works. Moreover, revision of Berne requires a unanimous vote, which means that the U.S. could veto decisions on the substance of Berne that would be contrary to those international goals.

Information technology is one of America's greatest assets in international commerce. As discussed above, eighteen of the twenty leading international database services are based in the United States; U.S. software holds an estimated 70% of the world market. The U.S. enjoys a commanding position in information technology, won by effort and innovation. But that commanding position can be lost if we do not vigilantly protect the rights of U.S. copyright owners throughout the world.

Japan's challenge to the U.S. in information technology and services will continue to increase over the next twenty years. So long as the United States is absent from Berne, Berne's dominant force in information technology will be its dominant economic power, Japan. Unfortunately, Japan has been less than enthusiastic in its embrace of copyright protection for works of new technology. It was only after repeated urging by the U.S. government that Japan amended its copyright law in 1986 to give explicit protection to computer software. The amendment was adopted, moreover, only after an internal struggle between Japan's Ministry of

Education and its Ministry of International Trade and Industry (MITI), which had argued for a form of protection for software that might have resulted in nationwide compulsory licensing for U.S. software.

MITI continues to question the international consensus of developed nations to protect software by copyright under the existing conventions. The Japanese submission to the General Agreement on Tariffs and Trade (GATT) seeks to reopen the question of software protection. If that effort is successful, it could deprive U.S. copyright owners of the fair return to which they are entitled in international markets.

The United States cannot wait any longer before joining Berne. As long as we are absent, Japan rather than the United States will lead the way. Only the United States itself can secure the vital interests of the U.S. in the future of information technology and copyright protection. U.S. adherence to Berne will substantially further that goal by enabling us to take a more active leadership role in the international copyright community.

C. U.S. Adherence to Berne Will Enhance Our Ability to Obtain Effective International Copyright Protection Bilaterally and in the GATT

The United States cannot credibly urge other governments to adopt Berne-level standards of protection when we ourselves do not adhere to Berne. U.S. Trade Representative Clayton Yeutter testified before this Subcommittee on February 18, 1988 that in our bilateral negotiations,

> [W]e have been operating under a handicap because we had to explain and defend U.S. non-adherence to the Berne Convention . . . . Non-adherence to Berne . . . allows trading partners to view the United States as something of a "second class citizen" in the copyright world, and question our commitment to attaining high levels of copyright protection internationally.

Statement of Ambassador Clayton Yeutter, United States Trade Representative, before the Subcommittee on Patents, Copyrights, and Trademarks, Committee on the Judiciary, U.S. Senate, at 3 (Feb. 18, 1988).

In the current round of multilateral trade negotiations in the GATT, the U.S. is negotiating for an intellectual property code that would provide for enforcement of Berne-level standards of international copyright protection. As in the bilateral discussions about which Ambassador Yeutter testified, our negotiators have had difficulty in persuading the rest of the world to adopt Berne-level standards of protection when we ourselves have been unwilling to join Berne. If we want the rest of the world to negotiate seriously on this issue and to respect our commitment to strong international protection of copyright rights, we must be able to demonstrate that we are willing to adhere to Berne.

The GATT intellectual property code is not a substitute for Berne adherence, as some have suggested. The GATT would provide a mechanism for the enforcement of protection, but the protection would be based on standards set out in the Berne Convention. We need both. Adherence to Berne is essential to our negotiations for enforcement of effective international copyright protection through the GATT, and our failure to join Berne could seriously jeopardize the GATT initiative.

D. U.S. Adherence to Berne Requires Only Minimal Changes in U.S. Law, and the Enabling Legislation Should Make Only Those Minimal Changes

Only minimal changes in our copyright law are required for the U.S. to adhere to Berne. We discuss below those changes that we believe are required in order to remove copyright formalities that are incompatible with Berne. We believe any remaining issues can be resolved without injuring the interests of either copyright owners or users.

It is our view that the Berne implementing legislation should make only those changes in our copyright law required for adherence. While some groups may wish to make other changes in our laws, we believe that the proponents and opponents on those other issues should pursue their interests separately from this legislation.

Moral Rights

The moral rights "issue," about which there has been much discussion before this Subcommittee, is perhaps the prime example of a matter that need not be substantively addressed in the enabling legislation. We believe that adherence to Berne does not require change in the U.S. law on moral rights, because U.S. moral rights protection under common law, various state statutes, and the Lanham Act already complies with Berne. Indeed, protection of moral rights in the U.S. is greater than in a number of Berne member countries.

We believe that the Berne compatibility of U.S. moral rights protection has been amply evidenced in the views of commentators, in the great weight of the testimony before this Subcommittee from Administration witnesses and those from the private sector, and in the Final Report of the Ad Hoc Working Group on U.S. Adherence to Berne (1986) ("Ad Hoc

Report"), reprinted in 10 Colum.-VLA J. Law & Arts 513, 547-57, and contained in Hearings Before the Subcommittee on Patents, Copyrights, and Trademarks, Committee on the Judiciary, U.S. Senate, 1st & 2d Sess. 427, 458-67 (May 16, 1985 & Apr. 15, 1986) ("Senate Hearings"). For this reason, we support the approach of all of the implementing bills -- S.1301, S.1971, H.R.2962, and H.R.1623, as amended[3] -- on moral rights. They do not seek to amend the copyright law in this regard, but set forth clear statements of the Congressional finding that, as otherwise amended in the legislation, U.S. law meets its Berne obligations.

Some parties have sought to raise a concern that moral rights would be changed as a result of our adherence to Berne. However, as the Ad Hoc Working Group, the State Department, commentators and witnesses in these hearings have demonstrated, Berne is not self-executing. Moreover, provisions in implementing bills meet this concern by stating explicitly the clear Congressional confirmation that the terms of Berne are not self-executing; that U.S.

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[3] Unless otherwise noted, references to H.R.1623 are to the amendment in the nature of a substitute voted out of the Kastenmeier Subcommittee on March 9, 1988. S.1971 and H.R.2962 -- the Administration bills -- are identical, with the exception of the amendment to S.1971 proposed by Senator Hatch, which will be discussed separately.

obligations under Berne can be effective only under U.S. law; and that the provisions of Berne shall not be directly enforceable. S.1301, §§2, 11(c); S.1971, §2; H.R. 1623 §§3, 6. H.R. 1623 also contains an explicit statement that adherence to Berne does not "expand or reduce any right of an author of a work" to claim authorship or "to object to any distortion, mutilation or other modification of, or other derogatory, action in relation to, the work, that would prejudice the author's honor or reputation." §4.

While we appreciate Senator Hatch's attempts to allay in some manner concerns stated by one segment of the copyright community, we believe the amendment to S.1971 that he proposed on March 2, 1988 (as well as a later version we have seen) would not be a practical approach. Both versions would make significant substantive changes in our law. The March 2, 1988 proposed amendment would wipe out any current moral rights; enact a one-way freeze on development of any rights equivalent to moral rights; and preempt development of moral rights under any Federal or State statute. The later version would freeze moral rights and rights equivalent thereto by setting a "cap" beyond which moral rights may not expand -- i.e. the rights existing "in any other state on the date of enactment of this Act." It would also preempt moral rights expansion beyond that level.

Either of these amendments would presumably satisfy those at one end of the spectrum of views on moral rights, who seek to make a substantive change in U.S. law. However, that approach is contrary to the "minimalist" approach of Chairman Kastenmeier and Senator Leahy and of the broad consensus supporting Berne adherence.

To achieve Berne adherence, the broad-based coalitions that support Berne have put aside any differences their constituents may have as to moral rights. They recognize -- as have the overwhelming majority of legal commentators who have addressed the issue -- that the present U.S. moral rights law complies with Berne, and that any attempts to alter that law should be pursued not in the context of Berne adherence but in separate legislation.

The concerns of those who fear unlimited moral rights expansion as a result of adherence are adequately met in each of the enabling bills by the clear and explicit Congressional statements. Anxiety as to moral rights consequences of the enabling legislation in the face of these statements is unfounded.

The minimalist approach remains the wise approach, and any attempt to wipe out or freeze moral rights is an unnecessary diversion. The overriding goal of Berne adherence can be achieved only if the various industry groups do not attempt to use Berne legislation to further extraneous goals.

IV. FORMALITIES

A. Introduction

Article 5(2) of the Berne Convention provides that "[t]he enjoyment and the exercise of [rights under the Convention] shall not be subject to any formality." The WIPO Guide explains that a formality is "a condition which is necessary for the right to exist -- administrative obligations laid down by national laws, which, if not fulfilled, lead to loss of copyright." ¶5.5.

The Convention makes clear that the prohibition against formalities would not apply in the United States to works of U.S. origin. Article 5(3) expressly provides that "[p]rotection in the country of origin is governed by domestic law."

The principal provisions of our current copyright law that must be considered in light of the Berne Convention's restriction on formalities are those that, as applied to works of foreign origin, concern copyright notice, registration of copyright, recordation of transfers, and mandatory deposit of published copies and phonorecords for the Library of Congress. We will discuss each in turn.

B. Notice

Section 401 of the Copyright Act provides that a work published under the authority of the copyright owner must have on all publicly distributed copies a copyright notice containing the year of first publication, an appropriate designation of the copyright owner, and either the symbol c , the word "Copyright" or the abbreviation "Copr.".

Section 402 contains analogous provisions for notice on phonorecords of sound recordings.

Section 405(a) of the Act provides that omission of copyright notice from publicly distributed copies or phonorecords does not invalidate the copyright if

> (1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or
>
> (2) registration for the work has been made before or is made within five years after publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or

> (3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

§405(b) provides essentially that one who "innocently infringes" a copyright and can show he or she was misled by the omission of notice "incurs no liability for actual or statutory damages."

Section 406, in conjunction with §405, provides for restrictions on enforcement, or for possible forfeiture, of copyright protection in cases of an error in the name or date in the copyright notice, or their omission.

The mandatory notice provisions of our copyright law are incompatible with the Berne Convention's proscription against formalities that impede "the enjoyment and the exercise" of copyright rights. This was the conclusion of the Ad Hoc Working Group with respect to §401 of the Act (it made no comment about the compatibility of §402). Ad Hoc Report, 10 Colum.-VLA J. Law & Arts at 559-60, Senate Hearings at 468-69. The Ad Hoc Working Group further concluded that the provisions of §405 do not cure the incompatibility, and we agree.

To be compatible with Berne, there are three possible ways of dealing with the U.S. notice requirement. The first is to require notice only for works of U.S. origin, thus creating a "two-tiered" system. As discussed more fully below, the IIA is opposed to a two-tiered approach because we believe it would discriminate unfairly against U.S. copyright owners. A two-tiered approach, moreover, would make more complex, and more confusing, a copyright system whose complicated provisions are criticized -- rightly or wrongly -- by those who are unfamiliar with them. All of the implementation bills reject a two-tiered system for our copyright law that would discriminate against U.S. copyright owners, and we agree.

The second alternative would be to eliminate the notice provisions entirely. The implementation bills adopt a third approach, making the notice provisions of §§401 and 402 optional rather than mandatory. We strongly endorse this approach.

S.1301 would also add §401(d) and §402(d) to provide that if a copyright notice does appear on published copies or phonorecords to which the defendant in an infringement suit had access, then "[n]o weight shall be given to the interposition of a defense based on 'innocent infringement' in mitigation of actual or statutory damages or of other relief specified by this title." (§5). H.R. 1623 contains a similar provision (§8). We believe that this provision creates an important incentive for use of copyright notice. As the Ad Hoc Working Group concluded, such incentives are permissible under Berne. See Ad Hoc Report, 10 Colum.-VLA J. Law & Arts at 574, Senate Hearings at 481. This incentive is more effective if, as under S.1301, such use of a copyright notice barred a defendant's claim of "innocent infringement" not only in mitigation of damages, but also as to other remedies as well.

We discuss §405(a) below, in connection with registration provisions.

All of the implementing bills would amend §405(b) to make it apply only to one who "innocently infringes" a work in reliance on copies published without notice before the effective date of the implementing legislation. Similarly, both bills would limit the applicability of §406 (error in name or date in copyright notice) to copies distributed prior to the effective date. (S.1301, §5; S.1971, §5(k),(m),(n),(o); H.R. 1623, §8(e),(f).)

We believe that modifying §405(b) and §406 to limit their subsequent application to copies publicly distributed with erroneous or omitted notices before the effective date of the implementing legislation will (1) resolve the Berne incompatibility and (2) avoid any unfairness to copyright owners who might prospectively be denied the benefit of the present provisions for earlier errors or omissions.[4]

Section 403 of the Copyright Act provides:

> Whenever a work is published in copies or phonorecords consisting preponderantly of one or more works of the United States Government, the notice of copyright provided by sections 401 or 402 shall also include a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.

S.1301, S.1971 and H.R. 1623 would continue this requirement, but would omit the reference to the copyright notice.

As we have indicated, the current copyright notice requirements in §§401 and 402 are incompatible with Berne, because they are conditions of copyright protection. The consequences of failure to include the statement under §403, pertaining to government works, are unclear (see §405(a), S.1301 §5(c), S.1971 §5(g), H.R. 1623 §8(c)), but if protection, or enforcement, were to be denied because of the omission of such a statement, we believe the requirement would be incompatible with Berne.

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[4] S.1301 would amend §405(b) by inserting the words "before the effective date of the . . . Act . . ." after "has been omitted" (§5(e)). S.1971 (§5(k) and H.R. 1623 (§8(e)(3)) contain a similar provision. We suggest instead that §405(b) be amended by inserting the words "publicly distributed before the effective date of the . . . Act . . ." after the words "authorized copy or phonorecord," to make clear that it is the public distribution without notice prior to the effective date of the Act, rather than the omission of notice itself, that is the operative factor.

We recommend that to be compatible §403 be amended to read as follows (referring to the amended §§401 and 402):

> Whenever a work is published in copies or phonorecords consisting preponderantly of one or more works of the United States Government and the notice of copyright described in sections 401 or 402 is affixed to such copies or phonorecords, the notice shall also be accompanied by a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected by copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific statements that will satisfy this requirement, but these examples shall not be considered exhaustive.

All of the implementing bills would repeal in its entirety §404 of the Copyright Act, which provides that a copyright notice on a collective work satisfies the notice requirement for each individual contribution to the collection. If, however, there are to be advantages provided for optional use of a copyright notice, as in the new §§401(d) and 402(d) proposed in S.1301 and H.R. 1623, then we believe the essence of §404 should be retained.

Such a provision would provide an important benefit for authors whose works are published in collective works, since publishers often do not include notices for each individual contribution to a collective work. Use of the optional notice for the collective work as a whole should be sufficient warning to preclude interposition of the defense of "innocent infringement" against a claim based either on the collective work or on the individual contribution.

C. Registration

Under our current copyright law, registration of copyright is permissive, not mandatory, with one exception. Section 408(a) provides:

> REGISTRATION PERMISSIVE. -- At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the work by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Subject to the provisions of section 405(a), such registration is not a condition of copyright.

Section 405(a), however, requires registration as one of the conditions for curing an omission of copyright notice. Section 406 incorporates that requirement in its reference to §405 to cover certain errors or omissions as to the name or date in the required notice.

Although registration is permissive, §411(a) makes it a prerequisite to bringing suit for copyright infringement. It provides that ". . . no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title."

Aside from making registration a condition to instituting suit, the Act also contains very strong incentives to registration. For example, §412 makes timely registration a prerequisite to an award of statutory damages or attorney's fees in an action for infringement. And §410(c) provides that

> [i]n any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.

The Ad Hoc Working Group recognized that, as applied to works of foreign origin, §405(a)'s requirement of registration as a condition for curing omission of copyright notice is incompatible with Berne. Ad Hoc Report, 10 Colum.-VLA J. Law & Arts at 565, Senate Hearings at 473. The Register of Copyrights, Ralph Oman, agreed with this conclusion in his testimony before the Kastenmeier Subcommittee on June 17, 1987. Statement of Ralph Oman, Register of Copyrights and

Assistant Librarian for Copyright Services, Before the House Subcommitee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee, 100th Congress, 1st Session at 27 (June 17, 1987) ("Oman Statement").

S.1301 (§§5, 7) and H.R. 1623 (§§8, 10) would eliminate the incompatibility of §405(a) by limiting its application to copies distributed before the effective date of the implementing legislation, and by striking the qualifying reference to §405(a) ("Subject to the provisions of section 405(a). . .") from the flat statement in §408(a) that "registration is not a condition of copyright protection."

S.1971 (§5(j)) attempts not only to eliminate the incompatibility of §405(a), but also to simplify it by amending it to provide, in effect, that publication of a work without the required copyright notice prior to the effective date of the implementing legislation does not invalidate the copyright in the work. However, because of our concern that such a provision might adversely affect those who relied on the absence of notice, we prefer the narrower approach of S.1301 and H.R. 1623.

The balance of §408, which provides for permissive registration, appears to be compatible with Berne. As the Ad Hoc Working Group found, "[a] number of Berne countries have permissive registration, apparently not regarded as a formality." Ad Hoc Report, 10 Colum.-VLA J. Law & Arts at 572, Senate Hearings at 480 (footnote omitted).

As noted, §411 of the Copyright Act makes registration a prerequisite to suit for copyright infringement. It is our view that this requirement is a formality that is not compatible with Article 5(2) of the Berne Convention as applied to works of foreign origin. See Ad Hoc Report, 10 Colum.-VLA J. Law & Arts at 565, 572-73, Senate Hearings at 473, 480-81.

Some have argued that registration as a prerequisite to suit is not a condition of protection and therefore not a formality as contemplated by Berne, but instead only a mere procedural requirement for the bringing of suit. However, as the WIPO Guide explains: "What one must look at is whether or not the rules laid down by the law concern the enjoyment and exercise of the rights." ¶5.5. We believe that the requirement of registration for suit conflicts with the Convention: in the plain language of Article 5(2), it is a "formality" that governs, in a very real sense, "the enjoyment and the exercise" of copyright rights.

Without registration, one may be possessed of the "exclusive rights to do and to authorize" what §106 describes, but "the enjoyment and the exercise" of these exclusive rights are empty if they cannot be enforced against an infringer. An empty right does not comply with Berne.

Indeed, the WIPO Guide explains "formalities" as "administrative obligations laid down by national laws, which, if not fulfilled, lead to loss of copyright." Although some examples are given ("the deposit of a copy of a work; its registration with some public or official body; the payment of registration fees, or one or more of these" (¶5.5)), it is necessary, as quoted above, to look at whether or not the rules "concern the enjoyment and exercise of the rights." And that is precisely the concern of our statutory requirement of registration as a prerequisite to suit.

Moreover, the absence of any enforcement of copyright (because of non-compliance with the condition of registration for suit) may well, in the words of the WIPO Guide, "lead to loss of copyright." As the WIPO Guide states, "[i]f protection depends on observing any such formality, it is in breach of the Convention." ¶5.5. Since registration as a prerequisite to suit does condition protection on a formality, it is therefore incompatible with Berne.

We note also that if this requirement were compatible with the Convention, other Berne members -- including some which are havens for piracy -- could obstruct or negate our enforcement efforts by charging outrageous fees of thousands of dollars for "registration as a prerequisite to suit." Neither the Copyright Office nor the Congress would contemplate such fees in the United States, but the U.S. view of Berne compatibility cannot be wholly at odds with what we would permit other Berne members to do.

Neither S.1971 nor H.R. 1623 would amend or repeal §411, thus retaining the requirement of registration as a condition for suit. We believe that the relevant provisions of §411 should be amended or repealed so that registration is no longer a condition of suit. The Berne Convention, of course, would permit us to retain the requirement for works of U.S. origin, but such a two-tiered system would unfairly discriminate against U.S. authors and copyright proprietors. To require U.S. proprietors to comply with the registration requirements and exempt works of foreign origin would be fundamentally unfair. Doing so would put U.S. proprietors at a serious disadvantage in comparison to their foreign colleagues and would also create considerable confusion. For this reason, the IIA considers the repeal of §411 to be a far superior resolution to the problem raised by its incompatibility with the Convention.

Even without the requirement of registration as a condition of suit, most copyright owners will continue to register because §410(c) and §412 -- retained under all of the implementing bills -- provide powerful incentives to a copyright owner to register.[5] Section 412 provides that a copyright owner may not collect statutory damages or attorney's fees for infringement of an unpublished work commenced prior to registration or for infringement of a published work commenced after publication and before registration (subject to a grace period for registration within three months after publication).

Section 410(c) provides that if registration is made within five years of publication, a certificate of registration is prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The complex and expensive nature of proof in new-technology infringement cases means that a prima facie "assist" is valuable indeed.

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[5] Indeed, these two sections provide far more powerful incentives to register than existed under the 1909 Act, when registration could be made many years after publication, and could be made even after the infringement occurred without depriving the copyright owner of statutory damages and attorney's fees.

It is for this reason that IIA members have relied heavily -- even more so than other copyright owners -- on our registration system. Indeed, the IIA over the last several years has devoted significant time and effort -- with the very substantial cooperation of the Register of Copyrights, his Counsel and staff -- to the matter of adapting registration and deposit procedures to facilitate the process for works of new technology for both the Copyright Office and the public.

Registration and deposit procedures present special questions for the creators of works of new technology, such as computer software, databases, and other new information products and services. For these works, the regulations and procedures originally developed for traditional works can be complex, cumbersome, and expensive. Because of the advantages to registration provided by §§410(c) and 412, the IIA has made it a priority to assist the Office in response to recent Copyright Office initiatives. Such initiatives include (to mention only a few) the Copyright Office Notices of Inquiry, Hearings or Proposed Regulations concerning registration and deposit of databases; separate registration of computer screen displays; and deposit of computer programs containing trade secret material.

The Ad Hoc Working Group concluded that incentives to registration such as those contained in §410(c) and §412 are not impermissible "formalities," noting that some Berne countries have such provisions in their laws. Ad Hoc Report, 10 Colum.-VLA J. Law & Arts at 573-74, Senate Hearings at 481-82; see Appendix to Chapter IX, "Registry and Deposit Systems of Some Berne Members," Ad Hoc Report, 10 Colum.-VLA J. Law & Arts at 575-80, Senate Hearings at 483-88.

Appropriately, neither S.1971 nor H.R. 1623 would alter or amend §410(c) or §412. We concur. We believe the benefits provided by §410(c) and §412 will ensure that most copyright owners will continue to register promptly in order to take advantage of those provisions.

S.1301 would amend §411 to provide explicitly that registration is not a prerequisite to suit. We agree with that approach and its recognition of the Berne incompatibility of a requirement of registration as a prerequisite to suit.

However, under the alternative it proposes as an incentive to registration, S.1301 would amend §412 to permit an award of statutory damages or attorney's fees in a copyright infringement suit only if registration is made within five years after publication -- even as to infringements commencing long after the registration. We believe this new provision would unfairly penalize authors, especially since the present §410(c) and §412 -- as well as §205(c) and §205(e), discussed below -- are already powerful incentives to register. We believe no additional incentives are needed.

We support the deletion by all of the bills of the requirement in §408(c)(2)(A) that for certain individual authors to be entitled to a single group registration of their works the works must have borne a copyright notice. Deletion of that requirement is consistent with the general deletion of a notice requirement.

D. Recordation

Section 205(d) of the Copyright Act provides:

> No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument of transfer under which such person claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation.

Just as §411 makes registration a condition of suit, §205(d) makes recordation a condition of suit. The Ad Hoc Working

Group concluded that requiring recordation for works of foreign origin as a prerequisite to suit is incompatible with Berne, since, like the requirement of registration as a prerequisite to suit, it "may effect the exercise of copyright." Ad Hoc Report, 10 Colum.-VLA J. Law & Arts at 572-73, Senate Hearings at 480-81.

Neither S.1971 nor H.R. 1623 alters §205(d). We believe that the conclusion of the Ad Hoc Working Group is correct, and that the requirement of recordation as a condition of suit should be removed from our copyright law. As with registration, we believe that a two-tiered approach -- under which the requirement of recordation as a prerequisite to suit would be maintained only for works of U.S. origin but not for works of foreign origin -- would unfairly discriminate against American copyright owners and would be confusing.

We therefore concur with the approach of S.1301, which would eliminate the requirement of recordation as a prerequisite to suit. We have given consideration to the question whether a further incentive to recordation should be provided by making the benefits of §412 contingent upon prompt recordation. Having considered that question, however, we reject it. We believe that the statute even now provides sufficient incentive to recordation in the advantages to be found in §205(c) (constructive notice) and §205(e) (priority between conflicting transfers).

Indeed, §205 provides incentives not only to recordation, but also additional incentives to registration that would remain in the statute under either bill. A transferee make take advantage of the constructive notice provisions of §205(c) and §205(e) only if registration is made for the work.

E. Deposit

Under §407 of the Copyright Act, the owner of copyright or of the exclusive right of publication in a work published in the U.S. with notice of copyright is required to deposit two complete copies or phonorecords of the best edition with the Copyright Office for the use or disposition of the Library of Congress (subject to exemptions the Register of Copyrights may provide by regulation). The statute explicitly provides that the deposit requirements of §407 are not conditions of copyright protection (§407(a)). However, under §407(d), the Register of Copyrights may make a written demand for the required deposit, and if the deposit is not received within three months of the demand, the copyright owner or the owner of the exclusive right of publication is subject to fines.

Since the deposit requirements of §407, although mandatory, are not a condition of copyright protection, in our view they do not constitute a formality incompatible with Berne. We agree with the conclusion of the Ad Hoc Working Group to that effect. Ad Hoc Report, 10 Colum.-VLA J. Law & Arts at 566; Senate Hearings at 474.

The Ad Hoc Working Group also noted that a number of Berne member countries require deposits for national libraries. Ad Hoc Report, 10 Colum.-VLA J. Law & Arts at 574; see 575-80; Senate Hearings 482; see 483-88. We believe that the Library of Congress plays a valuable role in our society by -- in the words of Ralph Oman, Register of Copyrights -- "acquir[ing], preserv[ing], and mak[ing] accessible to all, the material expressions of national cultural life." Oman Statement at 29. The deposit provision of §407 is essential to the Library of Congress in fulfilling this valuable role, and it is compatible with Berne. It should be retained.

We support the approach taken by the implementing bills which would amend §407(a) by striking the words "with notice of copyright," to reflect that notice will no longer be mandatory.

Deposit is also a necessary element of registration under §408. As the Ad Hoc Working Group concluded -- and we concur -- the deposit requirements of §408 are compatible with Berne, because they are merely ancillary to registration and registration itself under §408 is permissive, not mandatory. We have already discussed above the registration requirements of the Copyright Act, including our concurrence with the conclusion of the Ad Hoc Working Group that, while registration is compatible with Berne, registration as a prerequisite to suit is not.

* * * *

We have tried to outline the reasons why IIA strongly urges Berne adherence, and to indicate those few changes we believe are necessary in the enabling legislation. Again, we are very grateful for the dedicated efforts of the Subcommittee members and staff on this most important matter.

PREPARED STATEMENT OF WALTER BOHRER
PRESIDENT, AMUSEMENT AND MUSIC OPERATORS ASSOCIATION

We are pleased to present the views of the Amusement and Music Operators Association on the Berne Convention Implementation Act. The AMOA represents over 1000 firms throughout the United States which provide jukeboxes, video games, and other coin-operated entertainment devices used by our citizens in hundreds of thousands of locations throughout our country.

In 1889, Louis Glass fitted a coin slot on a wax cylinder Edison machine and placed it in the Palais Royale saloon in San Francisco. Ever since, the jukebox has been one of the most popular means of bringing musical expression to our people, wherever we gather to relax, share our experiences, and take pride in our musical and cultural diversity. Before the radio and far before the age of television, the jukebox became the means by which the musical compositions of our authors and their recorded performances became known to the American people. How many songs and compositions which would otherwise have passed unknown have achieved popularity through the jukebox? This is an important part of our American heritage which must be recognized under U.S. adherence to Berne--if adherence to Berne is what the Congress decides--and certainly under any revisions in U.S. laws which this committee makes to render our laws consistent with Berne.

The jukebox industry is already an industry under siege. The number of jukeboxes has declined and is continuing to decline. We are seeing a shift from jukeboxes owned and operated by companies, such as AMOA members, which specialize in this part of the entertainment industry, to jukeboxes owned and operated by the individual establishment. With support from the producers of recorded music, the many performers who understand the importance of the jukebox, and the performing rights societies, we hope to reverse this declining trend.

We have carefully followed the debate over the last several years on adherence to the Berne Convention. The Ad Hoc working Group on U.S. Adherence to the Berne Convention--a non-governmental group convened by the U.S. State Department--concluded that U.S. law on the jukebox compulsory license was "probably" incompatible with the Convention with respect to works of foreign origin. U.S. adherence to the Berne Convention could not in any way affect the copyright laws pertaining to musical works of U.S. origin. Specifically, the report of the Ad Hoc Working Group stated that:

> "The Report's conclusion that certain provisions of U.S. law are incompatible with Berne applies only to works of foreign origin. The Berne Convention does not require that a member country grant the

> protection required by the Convention's text to works of which that country is 'the country of origin.'"

and the following:

> "We conclude that:
> (1) with respect to musical works of foreign origin, the jukebox license under the current U.S. statute is probably incompatible with the Convention insofar as it permits the public performance of such works without the consent of the owners of copyright therein;
> (2) with respect to musical works of U.S. origin, however, the statute is compatible."

Representatives of both ASCAP and BMI were members of the Ad Hoc Working Group which reached this conclusion.

Second, a consensus has emerged at hearings in both this Committee and the House Judiciary Committee on the important point that the Berne Convention is not, in the lawyer's phrase, "self-executing." The Berne Convention implicitly recognizes the national and cultural distinctions that make up so much of the world's artistic heritage. The intention is to preserve and protect this heritage, not destroy it. The Berne Convention therefore calls on its adherents to provide copyright protection for the creators of artistic works performed or sold outside the country where they were originally copyrighted. Because the Berne Convention is not "self-executing," the President and the U.S. Congress must decide what, if any, changes in U.S. law are needed to make our laws compatible with Berne; U.S. adherence to the Berne Convention will not automatically result in U.S. law being changed to accord with Berne's provisions. AMOA urges that Congress make its intention to that effect indisputably clear.

As this committee knows, until 1976, the performance of music by jukeboxes was exempt from royalties except, of course, for the royalty paid on purchase of the record. This provision of the 1909 Copyright Act recognized that owners of coin-operated record machines already pay significant royalties through their purchase of records. Under this system, jukeboxes flourished and the publicity encouraged sales of recorded music, generating copyright flow to creators and performers.

In 1976, the Congress ended this exemption. Recognizing the impracticality of setting jukebox fees location by location and the minimal profitability of most jukeboxes, Congress adopted the per-jukebox annual compulsory license.

Overseas, during this time, the jukebox tradition never developed. Of course, the original drafters of the Berne Convention in 1886 had never heard of the jukebox; they were working three years before its invention in San Francisco in 1889. In most Berne Convention countries, jukeboxes are still less well-known than in the United States. This may be because the copyright laws of those countries inadvertently discourage jukeboxes. As a result there are few jukeboxes;

the industry is constrained, and the public hears few records in this manner. An important means by which the people of the Berne convention countries might hear more music--particularly popular music from the United States--and become more familiar with the works of American artists is underutilized. This is not a pattern we should wish to adopt at home.

Of course, the present compulsory license system is also susceptible to abuse. Under pressure from the performing rights societies, the rates for 1983 were sharply increased. This short-sighted action spurred a new decline in the number of jukeboxes, particularly operator-owned boxes. The new fees are out of line with those for background music and the requirement that a multi-site operator has to pay his registration fees for all of his jukeboxes all at once in the first month of the year is a severe financial hardship. Jukebox operators had no choice but to walk away from newly unprofitable locations. In many cases, they simply sold the jukebox to the owner of the tavern or restaurant--leaving responsibility for maintenance, record replacement, and registration with that individual owner. We were able to negotiate with the performing rights societies a voluntary agreement which provided rebates--in essence, reductions--on the license rate for 1985 and, after months of debate over technicalities, for part of 1986. But with the continuing decline in operator-owned locations, targets set in this agreement for rebates in 1987 have been missed. Unless this agreement is revised, future targets will also be missed. We have a reverse chicken-and-egg situation: as fees go up, individual locations, which are less likely to register, have an economic advantage over larger operators; ownership of jukeboxes therefore shifts to individual locations; registrations decline still further; and the burden falls all the more heavily on the responsible firms which comply. Enforcement is difficult and ownership by responsible businessmen is discouraged.

We describe this history to illustrate that the existing compulsory jukebox license, as presently operating and presently enforced--that is, discriminatorily and unequally--is a far from perfect system. However, to discard this system with nothing better in its place, would be the end of the American Jukebox tradition. Similarly, to throw out the compulsory license for works of foreign origin would serve only to end all playing of foreign works on jukeboxes in the U.S. This would hardly be of benefit to foreign composers; and we wonder if such action could lead to retaliation against U.S. composers overseas.

S. 1301, as introduced by Mr. Leahy, and S. 1976, introduced by Mr. Hatch, are essentially the same as regards the jukebox compulsory license. Each bill preserves the option of agreement on fees through voluntary negotiations, with the compulsory license to take effect if these negotiations fail. It is now clear that these provisions would make U.S. law compatible with Berne without throwing out the compulsory license or closing off the possibility of a better system in the future. Dr. Arpad Bogsch, director general of the World Intellectual Property Organization (which administers the Berne Convention), in material submitted for the record of hearings in the Senate Judiciary Committee in 1985, confirmed that some Berne Convention countries have a de facto compulsory license and agreed that provisions similar to those in this pending legislation would be compatible with Berne.

We therefore support this legislation, with one request for modification. In the case that negotiations fail or any voluntary agreement later expires, both S. 1301 and S. 1971 would simply turn the problem over to the Copyright Tribunal without qualification or instruction. The companion House legislation, H.R. 1623, instead directs the Copyright Tribunal, in determining if a return to the copyright owner is fair, to give "substantial deference" to "the rates in effect on the day before the effective date of the Berne Convention Implementation Act...and the rates contained in any license negotiated under Section 116 (b)." We believe this guidance to the Copyright Tribunal is needed and proper. Contrary to some statements, this provision would not preclude the Copyright Tribunal from making reasonable adjustments in light of changing circumstances. The Tribunal could still consider such factors as the declining number of jukeboxes, the increasing costs of jukebox operation and maintenance, or the return to copyright owners after expenses of the copyright societies. However, it would indicate to the Tribunal that the Congress intends that history not be discarded: that, as the language clearly states, the Tribunal would give "substantial deference" to rates set or agreements made in the past.

In conclusion, Mr. Chairman, we believe it is essential that both this legislation and the ratification of the Berne Convention which may follow make clear the view of this Committee and the Congress that Berne not be self-executing. Adherence to Berne neither changes U.S. law nor rules out further refinements in U.S. copyright law in the future. Until or unless the Congress should choose to make further changes in law, the existing compulsory license would be retained under S. 1301, taking effect if we and the copyright societies are unable voluntarily to agree on better and more equitable systems. Nor, by the same coin, would U.S. adherence to Berne prevent the Congress from considering future revisions to the existing compulsory license.

S. 1301, in conclusion, is a carefully-crafted bill. It preserves the option that copyright owners and jukebox operators may reach voluntary agreements; preserves the compulsory license as the fall-back to voluntary agreements until something better is put in its place; and leaves open the options of this Committee to review the compulsory license, the fees paid under it, and the means of enforcement, in the future. With a better environment and improved cooperation from the performing rights societies, we believe that the jukebox industry can continue to bring the best of both American and foreign music to our people--publicizing and extending the hearing, the popularity, and the sales of recorded compositions.

STATEMENT OF
JACK GOLODNER, DIRECTOR
DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO

FOR THE
SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS
OF THE
SENATE COMMITTEE ON THE JUDICIARY
ON THE
BERNE CONVENTION IMPLEMENTATION ACT OF 1987
(S. 1301, S. 1971)

MARCH 16, 1988

I am Jack Golodner, Director of the Department for Professional Employees (DPE), AFL-CIO. This statement represents the position of the AFL-CIO as well as that of the DPE.

While the AFL-CIO needs no introduction to the Subcommittee, perhaps a few words of background about the DPE might be useful. The Department is a constitutional component of the AFL-CIO and is comprised of 28 national and international AFL-CIO unions which represent about three million professional workers, including members of every major profession from actor to zoologist. Many of these workers are employed in our copyright based industries, ie. motion pictures, broadcasting, recording, etc., and therefore have a direct interest in legislation to implement the Berne Convention for the Protection of Literary and Artistic Works as revised at Paris on July 24, 1971 (Berne Convention) and ratification of that treaty.

Fostering creativity and productivity among American working people has been an object of the AFL-CIO since its inception. We have pursued this goal in a variety of ways -- by seeking to secure quality work places, fairness on the job and appropriate compensation and recognition. With regard to the latter, copyright law plays a major role. (See attached statement of the AFL-CIO Executive Council, Strengthening Copyright Protection). We believe that support for U.S. adherence to the Berne Convention is a logical extension of our historic position and is much needed in order to protect our creators and copyright owners in the international markets where their creations are marketed and used.

As is well known to the Subcommittee, the U.S. is the world's largest producer of copyrighted materials. Our copyright and information related industries earn a trade surplus each year in excess of $1 billion and rank second in the nation in terms of their contribution to the gross national product. They employ hundreds of thousands of American workers many of whom are members of our affiliated unions. Yet the situation could be far better than it is, if the well documented world-wide piracy of American sound and video recordings, computer software, and printed materials could be suppressed. And that is one of the promises that U.S. membership in the Berne Convention holds out.

Although Berne membership would not completely resolve the problem of world-wide piracy of American copyrighted materials it would be a significant step in that direction. Through Berne membership, American creators and copyright owners would receive the highest level of copyright protection available under any multilateral treaty in which the United States is eligible to participate in those countries which are the largest users and consumers of American copyrighted works. It would also establish copyright relations for the United States with twenty-four nations with which they presently do not exist.

In addition to these more immediate and tangible benefits, Berne membership would also allow the United States to assume a lead role in international policy-making with regard to copyright as is befitting the world's preeminent producer of copyrighted materials. Accordingly, Mr. Chairman, we believe that the United States should ratify and become a member of the Berne Convention.

However, we must take exception to the bills (S. 1301 and S. 1971) before you that would implement U.S. adherence to Berne. We do not object to any provision in either bill, but rather to what is omitted from both, namely provisions that would carry out the mandate of section 6 bis (1) of the Convention which provides -

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, multilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

It has been argued that such a provision is unnecessary. The conclusion to the chapter on moral rights (Chapter VI) in the Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention states that -

> Given the substantial protection now available for the real equivalent of moral rights under statutory and common law in the U.S., the lack of uniformity in protection of other Berne nations, the absence of moral rights provisions in some of their copyright laws, and the reservation of control over remedies to each Berne country, the protection of moral rights in the United States is compatible with the Berne Convention.*

What is clear though from a reading of the balance of Chapter VI is that U.S. law has in fact few, if any, provisions equivalent to the moral rights mandated by section 6 bis (1).

The provisions of that section are clear and unequivocal. Legislation purporting to implement the Berne Convention should be equally clear in acknowledging and accepting section 6 bis (1). Not to do so, we believe, would be highly inappropriate and would diminish the benefits of adherence.

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* Columbia - VLA Journal of Law & the Arts, vol. 10, no. 4 (Summer 1986), p. 35 (547).

Opposition to enactment of the moral rights prescribed by section 6 bis (1) seems to stem from two sources. First is the slight diminution of property rights which copyright proprietors would experience by virtue of the author/creator being accorded the right to object to modifications of his or her work that are prejudicial to his or her honor or reputation. Any modification that would be so prejudicial would by its very nature defile the work in question. Thus, the author/creator in addition to protecting his or her honor or reputation is also acting as society's conservator by preserving the work for posterity. Viewed in this larger context, we believe that the interests of the individual owner must yield.

The second ground for opposing these moral rights provisions is that it would foster controversy and impair the efficient functioning of enterprises, such as publishing houses, companies engaged in the production of motion pictures and sound recordings, radio and television broadcasters, and the like, which are based on the use of creative works. In response I would only note that several nations include moral rights provisions in their laws with no apparent detriment to efficiency, productivity or creativity. Mr. Chairman, we strongly urge the Subcommittee to include provisions responsive to the mandate of section 6 bis (1) in legislation that would implement the Berne Convention. I would also like to include as part of my statement the attached statement, which was adopted last month by the AFL-CIO Executive Council.

Statement by the AFL-CIO Executive Council

on

Strengthening Copyright Protection

February 18, 1988
Bal Harbour, FL

The AFL-CIO supports effective protection for copyrighted works and for their creators. The AFL-CIO has long endorsed the 1948 U.N. Declaration of Human Rights which says that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." We believe this is not only just, but also necessary if America's most creative minds and talents are to be encouraged.

Current copyright law, though intended to ensure the encouragement, development and protection of intellectual works, falls far short of its aim.

Because the United States has not ratified the Berne Convention for the Protection of Literary and Artistic Works, many foreign countries give American copyrighted works inadequate protection or no protection at all. As a result, massive losses are being inflicted on American copyright holders and the people they employ.

The Berne Convention provides the highest level of copyright protection in countries which are the largest users and consumers of American copyrighted works. In addition to providing economic protection, the convention recognizes the important "moral right" of creators to protect their work from unauthorized alteration or mutilation.

Adherence to the Berne Convention would improve and extend protection of American copyrighted works abroad and enable the U.S. to play a more effective role in international policymaking regarding copyright protection.

The AFL-CIO therefore calls upon the Senate to ratify the Berne Convention and urges the adoption of appropriate implementing legislation.

The AFL-CIO also calls on Congress at the same time to act on legislation which would ensure that employed and commissioned artists, authors and other creators are not deprived of basic economic and "moral rights." People are creators, not corporations, and the current "work for hire" doctrine needs to be modified so that art works created in a collaborative setting are not denied moral rights protection.

Finally, the AFL-CIO endorses efforts to amend U.S. copyright law in two specific ways: (1) to give performers similar rights and protections as are enjoyed by other creators by recognizing their contributions to "fixations" of their performances, and (2) to prohibit unauthorized or uncompensated copying of copyrighted material. Improvements in copying technology should not be allowed to undermine the economic well-being of America's authors, performers and others who create original material.

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STATEMENT IN OPPOSITION TO ADHERENCE TO THE BERNE CONVENTION BY THE UNITED STATES

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I. INTRODUCTION

The case against the Berne Convention can be summarized very simply. First and foremost, accession to the Berne Convention is irrevocable for all practical purposes, and such irrevocability in a governing law is inherently undesirable. While I would support a number of the changes in American copyright law that would follow from American adherence to the Berne Convention, I cannot support such changes at the cost of never again permitting Congress to change the American copyright laws on these issues when and if Congress may deem such changes in the national interest. Second, I do not believe that all of the terms that adherence to the Berne Convention requires are necessarily changes for the better. Moreover, the perceived defects of American copyright law which accession to Berne Convention would presumably cure can be dealt with on the basis of domestic legislation. Third, if adherence to the Berne Convention is premised on the argument that the Berne Convention will provide better protection of United States copyright interests from systematic international piracy than the Universal Copyright Convention, I would submit the argument has no merit. It is simply not the case that membership in the Berne Convention will cause any significantly different treatment of American copyrights abroad than they currently receive. Finally, current United States law really does not encompass the moral rights required by the Berne Convention.

II. THE INFLEXIBILITY OF ADHERENCE TO THE BERNE CONVENTION

For all practical intents and purposes once the United States acceded to the Berne Convention, it would be impossible to amend or adopt any aspect of the United States copyright laws in a manner that contradicted the provisions of the Berne Convention. Since doing so would forfeit all copyright protection for American works in all countries that are parties to the Berne Convention, the staggering losses this would inflict on American copyright owners, and on authors dependent on copyright royalties, would effectively prevent any such change in the United States copyright laws *even where Congress otherwise felt such a change was in the best interests of the United States.*

A. The Berne Convention and the "In Terrorem" Provision of the Universal Copyright Convention.

If the United States adheres to the Berne Convention and subsequently withdraws from the Berne Union, all international protection for American copyrights under the Universal Copyright Convention would also be forfeited. Section 2 of Article XVII of the Universal Copyright Convention provides that an annexed declaration shall be binding upon all members of the Berne Union. Paragraph (a) of the declaration provides that if any country that is a member of the Berne Union on or after January 1, 1951, withdraws from the Berne Union, such country shall forfeit all protection of its copyrights under the Universal Copyright Convention. Thus withdrawal from Berne would forfeit all international protection under both of the major international treaties.

As a practical consequence, this makes it virtually impossible for any country which is a member of the Berne Union to withdraw from Berne as the consequent economic losses to that country's authors make withdrawal an unacceptable alternative. Even if the country involved is a net importer of copyrighted materials (i.e., its balance of payments for imported and exported copyright rights and copyrighted works is negative), the loss of income to certain individuals and companies within the country would make withdrawal from the Berne Union unacceptable.

1. The Canadian Experience

A practical illustration of this point can be found in the Canadian experience. Canada is a net importer of copyright rights and copyrighted materials, a position that it regards as undesirable, and has entertained serious reservations about the Berne Convention. Yet Canada has felt constrained to remain in the Berne Union due to the impact of Article XVII of the UCC.

In 1957, the Ilsey Commission Report[1] recommended that Canada not accede to the 1948 revision of the Berne Convention.[2] In addition to objections to (1) submitting disputes to the International Court of Justice and (2) the imposition of a six year period before Canada might withdraw from the Berne Union, the Ilsey Commission saw no advantages to remaining in the Berne Union, and in fact noted some disadvantages. While the Commission stopped short of recommending Canada leave the Berne Convention, it suggested that future revisions of the Convention consider the problem of the economic burdens higher levels of copyright protection had for countries in Canada's position of being a net copyright importer. Canada subsequently adhered to the UCC in 1962, primarily so that Canadian authors would gain copyright protection in the United States under the relatively simple procedure required by the UCC.[3]

The subsequent Report of the Economic Council in 1971,[4] recognized that Canada was prevented from renouncing its treaty obligations by the loss that would be inflicted on Canadian authors and copyright owners even though it would probably benefit Canada's position as a "heavy net importer" of copyright rights and copyrighted materials. However, the report did recommend that Canada do nothing that would increase its obligations to provide higher levels of protection for copyright under international treaties.

Following the Economic Council Report, the Minister of Consumer and Corporate Affairs Canada formed a planning group to review the report and make recommendations for new legislation, if any, as to each of the fields of intellectual property. The resulting Report[5] in 1977 essentially reinforced these conclusions. The Report noted that it was the "net exporting countries [that] have a keen interest in high levels of protection" but that "Canada as a net importer, has interests which lie elsewhere."[6] The Report noted the constraints that Article XVII of the UCC placed on withdrawal from the Berne Union in detail.[7] The report ultimately does not recommend withdrawal from the Berne Convention[8] although it clearly concludes that the Berne Convention is illsuited to Canada's needs[9] and is emphatic that Canada should not accede to the more recent drafts which would increase the level of protection.[10] Reading the Report makes it hard to escape the inference that the Report would have recommended withdrawal from the Berne Convention had it not been for the in terrorem forfeiture of protection for Canadian authors under the UCC.

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[1] Royal Commission on Patents, Copyright, Trademarks and Industrial Design, Report on Copyright (Queen's Printer, Ottawa, 1957).

[2] Canada had become a member of the Berne Union by action of the United Kingdom in 1887. Canadian membership in the Berne Union is governed by the 1928 (Rome) text of the Berne Convenetion.

[3] *Supra* note 1 at 16-18.

[4] Economic Council of Canada, Report on Intellectual and Industrial Property, (1971) (Information Canada, Ottawa, Cat. EC 22-1370).

2. The American Experience

The Canadian experience with copyright is not an entirely accurate model for the United States. Probably the most significant difference is that the United States is probably the major net exporter of copyrighted materials and copyright rights in the world today. Moreover, this is at a time when American balance of payments deficits are a staggering problem and intellectual property is one of the few bright spots in the picture. Thus it is currently in our national interest to provide high (and expensive) levels of copyright protection and to encourage other nations to do so as well. Nonetheless, there is an important lesson to be learned.

The United States has not always been a major copyright exporter and there is no reason to believe that we will inevitably to continue to be one. For the greater part of our history, the United States was a copyright importer, and even a "pirate" nation. At those times, Congress deemed it to be in our national interest to adopt this status. We have no guarantee that at a future time it might be in the best interests of the United States to again lower the levels of copyright protection in one or more aspects from the minimum levels of protection required by the Berne Convention.

Much of the argument for adherence to the Berne Convention is based on the presumption that the United States will continue to be a major copyright exporter and we should thus adopt and promulgate the "higher level" of protection that Berne offers. Yet this presumption is questionable. Is there any reason that the current American preeminence in the copyright industries should be immune from the same erosion as our former preeminence in manufacturing and technology? It is submitted that the economic progress of Japan, the common market countries, and other areas of the world will not be long unreflected in their domestic production of intellectual and aesthetic works. As the world becomes increasingly internationalized, it also seems obvious that the United States will become as much of a target market for foreign films, music, books, and computer programs as we are now a target for their televisions, video recorders, tape recorders and computers.

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[5] A.A. KEYES & C. BRUNET, COPYRIGHT IN CANADA-PROPOSALS FOR A REVISION OF THE LAW (1977).

[6] *Id.*

[7] *Id.* at 19-21.

[8] *Id.* at 236.

[9] *Id.* at 235.

[10] *Id.* at 236.

The desirability of American music, motion pictures, computer programs, and other creative works is based on the perceived desirability and quality of such works in foreign countries. To the extent that Japan, the Common Market countries, or other countries remain net importers followers of American cultural and intellectual creations, it seems obvious that this is the result of factors which are independent of which treaty the United States ratifies. Certainly joining the Berne Union will have no impact on such factors as public taste in aesthetic works throughout the world.

While it may not happen in the immediate future—and I for one sincerely hope it never happens—it is not unrealistic to expect that at some future time the United States may again become a net copyright importer. When and if that happens, we should be able to make whatever changes in our copyright policy that Congress decides is in the best interests of the United States. For this reason, adopting the straitjacket of the Berne Convention would be a serious disservice to the long term interests of the United States.

III. ARE THE CHANGES REQUIRED BY BERNE DESIRABLE?

Even putting aside the necessity the necessity that Congress retain effective control over future American copyright policy, it is submitted that some of the changes in American copyright law that adherence to the Berne Convention will require are inherently undesirable.

A. Copyright Notice

The abolition of the requirement of notice is a critical issue. Among the major purposes served by notice identified in the committee reports that accompanied the 1976 Copyright Revision Act were that "[i]t informs the public as to whether a particular work is copyrighted; [i]t identifies the copyright owner; [and] [i]t shows the date of publication."[11] Stated in its most basic form, the public ought to have the right to easily determine whether or not a work is copyrighted or not by an examination of the work in question. The crux of the matter is that it is the copyright proprietor and the author, not the public, who have the information to determine when a copyright's term has expired and the copyright has gone into the public domain. It is not a significant burden on the copyright proprietor or author to give the public notice that the work is copyrighted. By contrast, it may be an almost impossible burden on the public to determine when a work's copyright has lapsed without either notice or a record in the Copyright Office.

Yet if the United States adheres to the Berne Convention, there will be no satisfactory way in which it is possible to tell if a work is copyrighted as notice need not be placed on the work and registration need not be made. Thus if a person wishes to copy a work that has been publicly distributed without notice, even a search of the copyright office records will not necessarily reveal the copyright status of the work, or if the term of protection for the work has in fact expired. This is simply too big a trap for the innocent to be tolerable. Moreover, it is simply an unfair burden on the public to have to research information to discover that a work has gone into the public domain (when was it first published, when did the author die, who was the author) where it is easily possible that both the authorized copies of the work and the records of the Copyright Office may be devoid of that information.

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[11] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 143 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 126 (1975).

While the abolition of the notice requirement is only one example, it does illustrate a larger point. There is no need to adhere to the Berne Convention simply to make changes in American copyright law. If abolition of copyright forfeiture due to lack of notice is desirable—and I strongly believe that it is—this can be done by amending American copyright law without joining the Berne Union.[12]

B. Other Issues

Considerations of time and space do not permit a detailed consideration of the other aspects of copyright law that adherence to the Berne Convention requires, such as the recognition of moral rights, a minimum term of protection of life of the author plus fifty years. However, at a minimum, it is fair to say that the desirability of these provisions are fairly debatable matters over which reasonable minds may differ. As such, it is apparent that a future generation's perspectives on what copyright policy best serves the United States may easily differ from ours. I, for one, do not have the arrogance to believe that my foresight and wisdom is capable of coming up with answers that will be ideal for all times and all future situations, and I submit that advocates of the Berne Union have neither better wisdom or greater foresight. Thus it seems to be folly to lock ourselves into the prescriptions of the Berne Convention.

Indeed the argument can be made that the Berne Convention was written at times and in contexts that are becoming increasingly inapplicable to the realities of copyright in the modern world. The Berne Convention was first promulgated in 1887, when printed literary works were the dominant form of copyrighted works and the technological abilities to attain a speedy commercialization of such works on an international scale was in a primitive state by modern standards. The basic orientation of Berne has not changed significantly over time. Given the technological advances in forms of copyrightable works, communications and reproductive technologies that have taken since even the last draft of the Berne Convention explosion, and the problems they pose for questions of balancing the rights of owners with the needs of the larger public, it is open to serious question whether the Berne Convention is an adequate vehicle for the future or simply a one-way passage to disaster.

IV. MEMBERSHIP IN THE BERNE UNION WILL NOT ENHANCE PROTECTION OF AMERICAN WORKS ABROAD

Many of the arguments for adherence to the Berne Convention essentially boil down to the proposition that Berne Union membership will provide superior international protection for American copyright interests than does the UCC. I submit this argument is without any substantial merit. Whatever progress has been made on these issues with countries where large scale piracy is and has been a problem stems more from the economic "muscle" of the United States and the willingness of the Regan Administration to tie American aid and trade to such nations to protection of American copyrights. Adherence to Berne will simply not alter this fact. Such problem areas of copyright piracy as Singapore, Indonesia, Korea, and Taiwan are not members of the Berne Convention and it is naive to expect that American membership in the Berne Union will make the slightest difference to them. The same is equally true of the many of the nations that are the large scale consumers of pirated copyrighted works, such as oil producing nations of the Middle East.

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[12] Innocent infringers who act in good faith and are without notice of the copyright can be protected in a fashion similar to the protection they are now given under 17 U.S.C. § 405(b).

There are several corollaries to this argument which are also advanced in support of the Berne Convention, and are equally unpersuasive. One such argument is that the United States lacks credibility when it argues for high levels of international copyright protection because it is not a member of the Berne Convention. The case for a country being credible in the level of copyright protection it urges on others goes to the level of copyright protection it provides in fact, not to what treaty it has ratified. In practice, the United States provides better copyright protection for both our nationals and foreign nationals than do many of the theoretically "higher protection" members of the Berne Convention. If this is advanced by other countries as an objection to protecting American works, I truly believe our representatives are sufficiently intelligent to respond by pointing out this rather spurious argument is an excuse, not a reason. Another related argument, is that we somehow ought to belong to the "older, more prestigious" organization. Why this should be so when there is no convincing case for it on the merits is a proposition that has yet to be demonstrated.

V. DOES UNITED STATES LAW RECOGNIZE MORAL RIGHTS

It is submitted that the current state of the law in the United States does not recognize moral rights in accordance with the provisions of Article 6*bis* of the Berne Convention. As I believe much of this has been covered in previous testimony and submissions, I will limit my comments to a few points.

First, to the extent American law provides parallels to the European concepts of moral rights, they are primarily rooted in notions of not misleading the public by false designations of source or origin as in the cases arising under Section 43(a) of the Lanham Act. However, even in such cases as *Gilliam v. American Broadcasting Companies*,[13] the crux of the decision holding that ABC could not edit the Monty Python shows was contractual, i.e., ABC, having acquired its rights to broadcast the Monty Python shows through a series of contracts was limited to the rights it had obtained in the contracts. Had ABC acquired a contractual right to edit the shows, nothing the authors could have done would have been able to prevent it. This is diametrically opposed to the moral rights concept of an inalienable right in the author to preserve the integrity of the work *notwithstanding any contractual arrangement to the contrary*. It is this critical feature of inalienability that is lacking from the American equivalents of the moral rights.

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[13] 538 F.2d 14 (2d Cir. 1976).

Moreover, it is submitted that such rights as the right to prevent the "distortion, mutilation, or other modification" are not encompassed by current American law. For example, if the purchaser of a painting, record, book, sculpture or other work so chose, he or she could destroy or mutilate that work. In addition, the moral rights encompassed by the Berne Convention include the right of the author to prevent any action in relation to the work "which would be prejudicial to [the author's] honor or reputation" is simply without parallel in American legal doctrine. We protect accurate identification because it protects the public by accurately indicating the source or origin. With the possible exception of our libel laws, we certainly do not have a calculus of rights based upon the author's "honor or reputation."

If we are to adopt moral rights, and it is quite arguable that we should do so, let us at least have the intellectual honesty to do so forthrightly instead of indulging in a blatant fiction for the sake of joining a particular treaty for which we clearly do not qualify. I submit the integrity of our legislative decision making is far too important to sacrifice for whatever perceived immediate expediency there is to joining the Berne Convention. That the officials of the Berne Convention are willing to indulge this fiction is only testimony to the fact that they are overwhelmingly anxious for the United States to join the Berne Convention. That is not a good reason for the United States to join.

VI. CONCLUSION

For the reasons stated above, I must oppose adherence to the Berne Convention. Principally, I believe that we may rue the day we joined the Berne Union if we should ever find it desirable to amend our copyright laws in our national interests in ways that are unacceptable to the Berne Convention. This overriding consideration is only supported by my concerns about the absence of a notice requirement as an unfair imposition on the public and the intellectual distortion of pretending we recognize moral rights when we in fact do not do so.

In closing, I would like to note that my initial reaction to the news that the United States would accede to the Berne Convention was one of support. However, after having studied the matter, particularly the problem of losing effective Congressional control over American copyright law and policy, I have come to the belief that adherence to the Berne Convention could easily be a disaster in the long run. As there is little if anything that would be accomplished by joining the Berne Union that could be not be accomplished outside of its bounds, there is no valid reason to join and overwhelming reasons to avoid the Berne Convention.

Thank you for the opportunity to submit my views on this issue.

Respectfully submitted,

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